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CASES ON
MILITARY LAW

COMPILED BY
THE STAFF CLASS
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FOREWORD

The object of this little book is to place before the officers of the Army the leading cases on military law in a simple and convenient form. A study of the leading cases is an essential part of the study of any branch of the law, and especially so of military law. Officers generally do not have access to the reports of the Supreme Court and other federal courts, and are thus handicapped in their study. These cases, prepared by practical military men, give a simple statement of the facts out of which the case arose, the points of law involved, and the decisions of the court. If analogous situations arise in the future, a careful study of these cases should enable officers to reach a proper decision.

It is intended to have future staff classes supplement and complete this work.

The selection of the cases and their revision is entirely the work of Captain Charles E. Stodter, 9th Cavalry, Instructor, Department of Law.

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The Army Staff College,
Fort Leavenworth, Kansas,
September 30, 1910.

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HOUSTON v. MOORE

Supreme Court of the United States, 1820, 5 Wheaton, 1

Prepared by Captain G.H. Davis, 12th U. S. Infantry

STATEMENT OF THE CASE

Houston was a private in a detachment of Pennsylvania militia which was ordered out for United States' service by the Governor in pursuance of a requisition of the President dated July 4, 1814.

Having been directed to march with the detachment to the appointed rendezvous, he neglected and failed to do so. For this neglect he was tried by a court-martial convened by the Governor of Pennsylvania under authority of Section 21 of the Act of the State of Pennsylvania of March 28, 1814, and was sentenced to pay a fine. Moore, a deputy U. S. marshal, levied on Houston's property. Houston then brought suit against Moore in the State Court of Common Pleas for trespass.

The State statute under authority of which Houston had been convicted by court-martial provides among other things that:—

"Every non-commissioned officer and private of the militia who shall have neglected or refused to serve when called into actual service, in pursuance of any order or requisition of the President of the United States, shall be liable to the penalties defined in the Act of the Congress of the United States passed on the 28th day of February 1795;" and then proceeds to enumerate them and to each clause adds: "or shall be liable to any penalty which may have been prescribed since the date of the passing of the said act, or which may hereafter be prescribed by any law of the United States."

The statute then further provides that

"within one month after the expiration of the time for which any detachment of militia shall have been called into the service of the United States, the proper brigade inspector shall summon a general or regimental court-martial, as the case may be, for the trial of such person or persons belonging to the detachment called out, who shall have refused or neglected to march therewith, or to furnish a sufficient substitute; or who, having marched therewith, shall have returned, without leave from his commanding officer, of which delinquents the proper brigade inspector shall furnish to the said court-martial an accurate list. And as soon as the said court-martial shall have decided in each of the cases which shall be submitted for their consideration, the president thereof shall furnish to the marshal of the United States, or to his deputy, and also to the comptroller of the treasury of the United States, a list of the delinquents fined, in order that further proceedings directed to be had thereon by the laws of the United States may be completed."

At the trial of Moore for trespass Houston prayed the court to instruct the jury:—

"That the first, second, and third paragraphs of the 21st section of the above statute of Pennsylvania, so far as they related to the militia called into the service of the United States, under the laws of Congress, and who failed to obey the orders of the President of the United States, are contrary to the Constitution of the United States and the laws of Congress made in pursuance thereof, and are, therefore, null and void."

The court, however, gave instructions to the contrary and a judgment having been rendered for the defendant the case was carried to the Supreme Court of Pennsylvania where the judgment of the lower court was affirmed. It was then taken to the Supreme Court of the United States under the 25th Section of the Judiciary Act.

The constitutional provision and laws of the

United States to which it was claimed the Pennsylvania law was repugnant are:—

1. The Constitution provides that Congress shall have power to provide for calling forth the militia in three specified cases: for organizing, arming, and disciplining them; and for governing such parts of them as may be employed in the service of the United States; reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress. It is further provided, that the President of the United States shall be commander of the militia, when called into the actual service of the United States.

2. The act of the 2d of May, 1792, which is reenacted almost verbatim by that of the 28th of February, 1795, authorizes the President of the United States, in case of invasion, or of imminent danger of it, or when it may be necessary for executing the laws of the United States, or to suppress insurrections, to call forth such number of the militia of the states most convenient to the scene of action, as he may judge necessary and to issue his orders for that purpose to such officer of the militia as he may think proper. It prescribes the amount of pay and allowances of the militia so called forth, and employed in the service of the United States, and subjects them to the Rules and Articles of War applicable to the regular troops. It then proceeds to prescribe the punishment to be inflicted upon delinquents, and the tribunal which is to try them, by declaring, that every officer or private who shall fail to obey the orders of the President in any of the cases before recited should be liable to pay a certain fine, to be determined and adjusted by a court-martial, and to be imprisoned, by a like sentence, on failure of payment. The courts-martial for the trial of militia, are to be composed of militia officers only, and the fines to be certified by the presiding officer of the court, to the marshal of the district, and to be levied by him, and, also, to the supervisor, to whom the fines are to be paid over.

The act of the 18th of April, 1814, provides that

courts-martial, to be composed of militia officers only, for the trial of militia, drafted, detached, and called forth for the service of the United States, whether acting in conjunction with the regular forces or otherwise, shall, whenever necessary, be appointed, held and conducted in the manner prescribed by the Rules and Articles of War, for appointing, holding and conducting courts-martial for the trial of delinquents in the army of the United States."

QUESTIONS TO BE DECIDED

The defendant contended, first, that militiamen, when called into the service of the United States by the President's orders, communicated either to the executive or to any inferior militia officer of a state, are not to be considered as being in the service of the United States until they are mustered at the place of rendezvous. This being so, second, that the state retains the right concurrent with the United States to punish this delinquency.

It was admitted that so long as the militia are acting under the jurisdiction of the state to which they belong, the power of legislation over them is concurrent in the general and state government. It was conceded that after a detachment has been called forth and has entered into the service of the United States, the authority of the general government over such detachment is exclusive.

The plaintiff, besides denying the two contentions of the defendant above cited, claimed that if state jurisdiction be admitted it would either oust the jurisdiction of the United States' court-martial or might subject the accused to be twice tried for the same offense; that if the governor of the state had authority to try these men he might, in case of conviction, have pardoned them.

OPINION OF THE COURT

The court was divided in its opinion on these points. Mr. J. Washington, delivering the opinion of the court, said in conclusion:

"Two judges are of the opinion that the law in question is unconstitutional and that the judgment below ought to be reversed. The other judges are of the opinion that the judgment ought to be affirmed; but they do not concur in all respects in the reasons which influence my opinion."

Mr. J. Johnson said:

"In this case, it will be observed that there is no point whatever decided, except that the fine was constitutionally imposed upon the plaintiff in error. The courses of reasoning by which the judges have reached this conclusion are various, coinciding in but one thing, namely, that there is no error in the judgment of the state court of Pennsylvania."

Mr. J. Story said:

"I feel myself bound to declare that the clauses of the militia act of Pennsylvania now in question are repugnant to the Constitution and laws of Congress on the same subject, and are utterly void, and that therefore the judgment of the state court ought to be reversed. In this opinion I have the concurrence of one of my brethren."

An attempt will now be made to show on what grounds the court were agreed and on what points there was disagreement.

The court were all agreed that the mere calling out of the militia did not put it in the actual service of the United States. Before it could be considered in actual service, some other act, such as mustering in, was necessary. On this point the opinion of J. Washington reads:

"From this brief summary of the laws, it would seem that actual service was considered by Congress

as the criterion of national militia and that service did not commence until the arrival of the militia at the place of rendezvous * * * and indeed it would seem to border somewhat upon an absurdity to say that a militiaman was in the service of the United States at any time, who, so far from entering into it for a single moment, had refused to do so, and who never did any act to connect him with such service."

Johnson J. says:

"I am perfectly satisfied that the individual in this case was not amenable to any law of the United States; both that there was no law of the United States that reached his case and that there was nothing done or intended to be done by the government of the United States to bring him within their laws before he reached the place of rendezvous."

Story J. says:

"In my judgment, there are the strongest reasons to believe that by employment 'in the service,' or, as it is usually expressed, 'in the actual service' of the United States, something more must be meant than a mere calling forth of the militia—that it includes some acts of organization, mustering, or marching done or recognized in obedience to the call in the public service."

It being admitted then that a militiaman refusing to obey the order of the President to enter the service of the United States, is not to be considered in the service of the United States or removed from the military jurisdiction of the State to which he belongs, the next question to decide is, is it competent for the State to which he belongs to provide for trying and punishing him for his disobedience by a court-martial deriving its authority from the State. On this question the court was divided.

Justices Washington and Story held that the offense was solely one against the United States. Justice Johnson that while it undoubtedly might be

an offense against the United States still it was also an offense against the State and in support of his contention said:—

"Every citizen of a State owes a double allegiance; he enjoys the protection and participates in the government of both the State and the United States. It is obvious, that in those cases in which the United States may exercise the right of exclusive legislation, it will rest with Congress to determine whether the general government shall exercise the right of punishing exclusively or leave the States at liberty to exercise their own discretion. But where the United States cannot assume or where they have not assumed this exclusive right of power I cannot imagine a reason why the States may not also, if they feel themselves injured by the same offense, assert their right of inflicting punishment also."

The sole difference in the opinions thus far seems to be this:—Justices Washington and Story hold the offense was purely one against the United States and that that government only could prescribe punishment for it. Justice Johnson held that the United States might have made it an exclusive offense against itself but having failed to do so, the State could make it an offense against itself also, and could assume jurisdiction thereof. This reason was sufficient for affirming the judgment of the lower court.

From this point the opinions of Washington J. and Story J. differ. The former holds that the Pennsylvania Law creates no offense and prescribes no punishment. It merely recites the law of the United States concerning this matter in order to confer authority on its own tribunal to try the matter which otherwise would be without jurisdiction and he contends that such jurisdiction is contemplated and intended by the acts of Congress for the following reasons:

1. Exclusive jurisdiction is not given to courts-

martial deriving their authority from the national government, by express words, although it is admitted such might have been done.

2. In every case in which State tribunals are not expressly excluded by acts of the national legislature they may, of course, take cognizance of the causes to which those acts might give birth. (Letters of Publius, or Federalist No. 82.)

3. The Judiciary Act confers upon the circuit and district courts of the United States exclusive jurisdiction of offenses against its penal laws but military offenses are not included in such acts.

4. While State courts may exercise a concurrent jurisdiction with the United States courts, if the former previously had such jurisdiction, still Congress can not confer jurisdiction upon them.

5. The Act of 1812 does not render jurisdiction conferred upon the federal court-martial exclusive. It provides that courts-martial for the trial of militia drafted and called forth shall when necessary, be appointed, held, and conducted in the manner prescribed by the rules of war. The opinion of Washington J. on the last point reads:—

"But the law used the expression 'when necessary'. How is this to be understood? It may mean, I acknowledge, whenever there are delinquents to try; but surely if it imports no more than this it was very unnecessarily used, since it would have been sufficient to say that courts-martial for the trial of militia called into the service, should be formed and conducted in the manner prescribed by the law. The Act of 1795 had declared who were liable to be tried, but had not said with precision before what court the trial should be had. This act describes the court; and the two laws being construed together, would seem to mean that every such delinquent as is described in the Act of 1795 should pay a fine, to be determined and adjudged by a court martial, to be composed of militia officers, to be appointed and con-

ducted in the manner prescribed by the Articles of War. These words, 'when necessary,' have no meaning, if they are confined to the existence of cases for trial before the court. But if they be construed (as I think they ought to be) to apply to trials rendered necessary by the omission of the States to provide for State courts-martial, to exercise a jurisdiction in in the case, or of such courts to take cognizance of them when so authorized, they have an important and useful meaning. If the State court-martial proceeds to take cognizance of the cases, it may not appear necessary to the proper officer in the service of the United States to summon a court-martial to try the same cases; if they do not or for want of authority cannot try them, then it may be necessary to convene a court-martial under the Articles of War, to take and to exercise the jurisdiction. * * * Upon the whole I am of opinion that the State court-martial had a concurrent jurisdiction with the tribunal pointed out by acts of Congress to try a militiaman who had disobeyed the call of the President and to enforce the laws of Congress against such delinquent; and that this authority will remain to be so exercised until it shall have pleased Congress to vest it exclusively elsewhere or until the State of Pennsylvania shall withdraw from their courts-martial the authority to take such jurisdiction."

On the other hand Mr. J. Story contended that the jurisdiction of the Federal court-martial was necessarily exclusive for the reasons that the law mentioning a court-martial was a United States law and must naturally refer only to a United States court-martial. Furthermore if it were intended to confer concurrent jurisdiction on a State court-martial the law would have expressly stated it. Without expressed delegation a State court cannot assume jurisdiction as an attribute of original sovereignty. Its original sovereignty did not extend to offenses created by acts of Congress. Such offenses sprang from the Union. Moreover, if a State court-martial were intended there would be no necessity for pro-

viding that courts-martial for the trial of militia should be composed of militia officers only because States do not have control of regular officers. It must be conceded then that federal courts-martial have exclusive jurisdiction.

Mr. J. Story concludes:

"If, then, we strip the case before the court of all unnecessary appendages, it presents this point, that Congress had declared that its own courts-martial shall have exclusive jurisdiction of the offense, and the State of Pennsylvania claims a right to interfere with that exclusive jurisdiction, and to decide in its own courts upon the merits of every case of alleged delinquency. Can a more direct collision with the authority of the United States be imagined? It is an exercise of concurrent authority where the laws of Congress have constitutionally denied it. If an act of Congress be the supreme law of the land, it cannot be made more binding by an affirmative reenactment of the same act by a State legislature. The latter must be merely inoperative and void."

List of authorities cited by the court:—

Statutes at large.
Statutes, Pennsylvania.
Federalist No. 82.
Chirac v. Chirac, 2 Wheaton 259-269.
Martin v. Hunter, 1 Wheaton 304-327.
U. S. v. Lathrop, 17 Johns Rep. 4.
Ex parte Belson, 5 Holls Amer. Law Journal, Pa.
White v. Commonwealth, 4 Binn 418.
Livingston v. Van Ingen, 9 Johns 507, 567.

MARTIN v. MOTT

Supreme Court of the United States, 1827, 12 Wheaton 19

Prepared by Captain J. McA. Palmer, 15th Infantry

STATEMENT OF THE CASE

Jacob E. Mott was a member of the militia of the State of New York. Sometime during the war of 1812, he was ordered to a designated place of rendezvous in order to be mustered into the service of the United States. The order was issued by the Commander-in-Chief of the Militia of the State of New York pursuant to a requisition issued by the President of the United States under the provisions of the Act of February 28, 1795. Mott refused and failed to report at the place of rendezvous.

More than three years after the expiration of the war, Mott was brought before a general court-martial and tried under Section 5 of the Act of 1795, which provides "that every officer, non-commissioned officer or private of the militia, who shall fail to obey the orders of the President of the United States," etc., "shall forfeit a sum not exceeding one year's pay and not less than one month's pay, to be determined and adjudged by a court-martial".

The act further provides that the delinquents "shall be liable to be imprisoned by a like sentence, on failure of payment of the fines adjudged against them, for one calendar month for every five dollars of such fine".

The court-martial was convened by a general commanding an army and was composed of six militia officers, the Act of 1795 having provided "that courts-

martial for the trial of militia shall be composed of militia officers only."

The sentence of the court as certified by its president was as follows:

And thereupon the said general court-martial imposed the sum of $96 as a fine on the said Jacob E. Mott for having thus failed, neglected, and refused to rendezvous and enter in the service of the United States of America, when thereto required as aforesaid, and that the said Jacob E. Mott was sentenced by the said general court-martial, on failure of the payment of the said fine imposed on him, to twelve months imprisonment."

The sentence of the court as prescribed by law was turned over to the United States marshal for execution, and was actually executed by one Martin, a deputy marshal who seized certain goods and chattels belonging to Mott.

The lawsuit originated in an action of replevin to recover these goods and chattels. Martin put in an avowry asserting a justification of the taking to satisfy a fine and forfeiture imposed upon Mott by a court-martial acting in pursuance to the act of February 28, 1795. Mott filed a demurrer assigning nineteen distinct and special causes of demurrer. Upon a joinder in demurrer the Supreme Court of the State gave judgment against Martin, and that judgment was affirmed by the court for the trial of impeachments and the correction of errors of the State of New York, the highest court of that State.

The case was then taken on writ of error to the Supreme Court of the United States, where the alleged causes of demurrer were reviewed.

POINTS OF LAW TO BE DECIDED

The most essential questions raised by the case are as follows:

1. Who is to determine when the exigency

justifying the calling out of the militia actually exists?

2. If the judgment of the President is conclusive as to the existence of the exigency, was it a defect in the avowry that it omitted to aver that the exigency did exist?

3. Was it necessary to set forth the orders of the President in the avowry? It appears that the avowry did not set forth such orders, but only averred that the Governor of New York called out the militia upon the requisition of the President.

4. As Mott had never been in the service of the United States but had failed to enter such service was the court-martial that tried him a lawfully constituted court-martial having jurisdiction of the offense at the time of passing sentence?

5. Was it a fatal defect that the court-martial was not composed of the right number of officers required by the Articles of War, and that it did not, in other particulars, follow the procedure prescribed by the Articles of War.

6. Was the sentence legal in view of the fact that the proceedings took place and sentence was given three years and more after the war was concluded and in a time of profound peace?

DISCUSSION OF THE CASE AND OPINION OF THE COURT

The questions of law as stated above were disposed of by the court in the following manner:

1. Who is to determine when the exigency justifying the calling out of the militia actually exists?

In answer to this question the opinion of the court is as follows:

"For the more clear and exact consideration of the subject, it may be necessary to refer to the Constitution of the United States, and some of the provisions of the Act of 1795. The Constitution declares that Congress shall have power 'to provide for call-

ing forth the militia, and to execute the laws of the Union, suppress insurrections, repel invasion;' and also 'to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States.' In pursuance of this authority, the Act of 1795 has provided 'that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the state or states most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose to such officer or officers of the militia as he may think proper'. And like provisions are made for the other cases stated in the Constitution. * * *

* * * Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally then to be contested by every militia-man who shall refuse to obey the orders of the President? We are all of the opinion, that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. * * *

Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case, we are all of the opinion that such is the true construction of the Act of 1795."

2. If the judgment of the President is conclusive as to the existence of the exigency, was it a defect in the avowry that it omitted to aver that the exigency did exist?

"But it is now contended, as it was contended in that case, (Vanderbeyden v. Young, 11 Johns Rep. 150), that notwithstanding the judgment of the President is conclusive as to the existence of the exigency,

and may be given in evidence as conclusive proof thereof, yet that the avowry is fatally defective, because it omits to aver that the fact did exist. The argument is, that the power confided to the President is a limited power, and can be exercised only in the cases pointed out in the statute, and therefore it is necessary to aver the facts which bring the exercise within the purview of the statute. In short, the same principles are sought to be applied to the delegation and exercise of this power intrusted to the Executive of the nation for great political purposes, as might be applied to the humblest officer in the Government, acting upon the most narrow and special authority. It is the opinion of the court that this objection cannot be maintained. When the President exercises an authority confided to him by law, the presumption is, that it is exercised in pursuance of law. * * * It is not necessary to aver, that the act which he might rightfully do, was so done. If the fact of the existence of the exigency were averred, it would be traversable, and of course might be passed upon by a jury: and thus the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the findings of those facts upon the proofs submitted to a jury."

3. Was it necessary to set forth the orders of the President in the avowry? It appears that the avowry did not set forth such orders, but only averred that the Governor of New York called out the militia upon the requisition of the President.

Says the court with reference to this point:

"The objection, as far as it proceeds upon a supposed difference between a requisition and an order, is untenable; for a requisition calling forth the militia is, in legal intendment, an order, and must be so interpreted in the avowry. The majority of the court understood and acted upon this sense, which is one of the acknowledged senses of the word, in Houston v. Moore, 5 W. 1."

4. As Mott had never been in the service of the United States but had failed to enter such service,

was the court-martial that tried him a lawfully constituted court-martial having jurisdiction of the offense at the time of passing sentence?

The opinion disposes of the question as follows:

"The case of Houston v. Moore, 5 W. 1, affords a conclusive answer to this suggestion. It was decided in that case, that although a militia-man, who refuses to obey the orders of the President calling him into the public service, was not, in the sense of the Act of 1795, 'employed in the service of the United States,' so as to be subject to the Rules and Articles of War; yet that he was liable to be tried for the offense under the 5th Section of the same act, by a court-martial called under the authority of the United States."

In other words, while Mott was not subject to the jurisdiction of the courts-martial provided under the authority of the Statutes known as the Rules and Articles of War he was subject to the courts-martial provided by the Act of 1795 for the punishment of the specific offense of refusing to enter the service in obedience to the orders of the President.

5. Was it a fatal defect that the court-martial was not composed of the right number of officers required by the Articles of War, and that it did not, in other particulars, follow the procedure prescribed by the Articles of War?

The opinion indicates that the composition of the court-martial and its procedure did as a matter of fact, conform in all essential particulars to the requirements of the Articles of War, but it is pointed out that this is not pertinent to the case. For as indicated in the opinion on the preceding question, Mott was not tried under the Articles of War, as they could not apply to a militia-man who had failed to enter the service of the United States. His court-martial was authorized directly by the Act of 1795, and its composition and procedure must be determined solely by the terms of that act.

The Act of 1795 prescribed "that courts-martial for the trial of militia shall be composed of militia officers only", and this was the only limitation contained in the act. The opinion continues as follows:

"It is not, therefore, admitted * * * that such a court-martial as is contemplated for the trial of delinquents under the 5th section of the act of 1795, is to be composed of the same number of officers, organized in the same manner as these rules and articles contemplate for persons in actual service. If any resort is to be had to them, it can only be to guide the discretion of the officer ordering the court, as matter of usage, and not as matter of positive institution. If, then, there be no mode pointed out for the formation of the court-martial in these cases, it may be asked, in what manner is such court to be appointed? The answer is, according to the general usage of the military service, or what may not unfitly be called the customary military law. It is by the same law that courts-martial, when duly organized, are bound to execute their duties, and regulate their modes of proceeding, in the absence of positive enactments. Upon any other principle, courts-martial would be left without any adequate means to exercise the authority confided to them; for there could scarcely be a positive code to provide for the infinite variety of incidents applicable to them."

6. Was the sentence legal, in view of the fact that the proceedings took place and sentence was given three years and more after the war was concluded and in a time of profound peace?

"The opinion of the court is that a court-martial, regularly called under the act of 1795, does not expire with the end of war then existing, nor is its jurisdiction to try these offenses in any shape dependent upon the fact of war or peace. The act of 1795 is not confined in its operation to cases of refusal to obey the orders of the President in times of public war. On the contrary, that act authorizes the President to call forth the militia to suppress insurrection, and to enforce the laws of the United

States in times of peace. And courts-martial are, under the 5th section of the act, entitled to take cognizance of, and to punish delinquencies in such cases, as well as in cases where the object is to repel invasion in times of war. It would be a strained construction of the act to limit the authority of the court to the mere time of the existence of the particular exigency, when it might be thereby unable to take cognizance of and decide upon a single offense. It is sufficient for us to say that there is no such limitation in the act itself."

DECISION OF THE COURT

"Upon the whole, it is the opinion of the court that the judgment of the court for the trial of impeachment and errors ought to be reversed, and that the cause be remanded to the same court with directions to cause a judgment to be entered upon the pleadings in favor of the avowant."

CASES CITED IN MARTIN V. MOTT

1. Houston v. Moore, 5 W. 1. In this case it was decided that a state statute which authorized a state court-martial to try a militiaman for failure to obey the President's order calling forth the militia, and to impose the penalties prescribed in the act of Congress of February 28, 1795, is a constitutional statute.

2. Vanderheyden v. Young, 11 John's Rep. 150 (N. Y.).

CITATIONS OF MARTIN V. MOTT IN SUBSEQUENT CASES BEFORE THE SUPREME COURT OF THE UNITED STATES

Luther v. Borden, 7 How. 44, 61, 77.

Murray v. Hoboken Land & Imp. Co., 18 How. 280.

Ex parte Vallandigham, 1 Wall. 254.

Wilkes v. Dinsman, 7 How. 130.

U. S. v. Speed, 8 Wall. 83.
Cook v. Moffat, 5 How. 315.
Smith v. Whitney, 116 U. S. 179.
Mullan v. U. S., 140 U. S. 245.
Nashimura Ekiu v. U. S., 142 U. S. 660.
Lem Moon Sing v. U. S., 158 U. S. 544.
Swain v. U. S., 165 U. S. 559.

UNITED STATES v. TARBLE

Supreme Court of the United States, 1870, 13 Wallace 397

Prepared by Captain C. S. Lincoln, 2d Infantry

STATEMENT OF THE CASE

Tarble enlisted in the United States Army July 27, 1869, under the name of Frank Brown, for a period of five years.

He took the oath required by law and Army Regulations, in which he declared he was 21 years old, and was mustered into the service of the United States; later he deserted the service, was apprehended and held in confinement by Lieutenant Stone, United States Army, recruiting officer in the city of Madison, Wisconsin, under charge of desertion, awaiting trial by proper military authorities.

This case was a proceeding on habeas corpus for his discharge from said confinement on the ground that he was a minor, under the age of 18 at the time of his enlistment, and that he enlisted without the consent of his father.

The writ of habeas corpus was issued on August 10, 1869, upon petition of Tarble's father, by a court commissioner of Dane County, Wisconsin, an officer duly authorized to issue said writ.

The writ was directed to Lieutenant Stone and commanded him "to have Tarble, together with the cause of his imprisonment and detention, before the commissioner, at the latter's office, in the city of Madison, immediately after the receipt of the writ."

Lieutenant Stone produced Tarble before the commissioner and made a return in writing to the

writ, "protesting that the commissioner had no jurisdiction in the premises, and, stating, as the authority and cause for the detention of the prisoner, that he, the officer, was a first lieutenant in the Army of the United States, and by due authority was detailed as recruiting officer at the city of Madison, in the state of Wisconsin, and as such officer had the custody and command of all soldiers recruited for the Army at that city". This return also included a history of the case as given above.

The petitioner filed a reply to the above return denying: that Tarble had been duly enlisted or mustered as a soldier into the army; or that he had declared under oath that he was 21 years old. The reply stated that the oath of allegiance was the only oath taken at enlistment and "that the prisoner was not, and never had been, a deserter from the military service of the United States".

The case was heard by the commissioner on August 12, who, after the case had been presented, "held that the prisoner was illegally imprisoned and detained by Lieutenant Stone, and commanded that officer forthwith to discharge him from custody".

The case was carried to the Supreme Court of Wisconsin and in April, 1870, this court affirmed the judgment of the commissioner.

This judgment was then taken before the Supreme Court of the United States on writ of error, prosecuted by the Government.

THE POINTS OF LAW TO BE DECIDED

1. Has a state court commissioner jurisdiction, upon habeas corpus, "to inquire into the validity of the enlistment of soldiers into the military service of the United States, and to discharge them from such service when, in his judgment, their enlistment has not been made in conformity with the laws of the

United States?" That is, has he jurisdiction to proceed when a person is held under authority of the National Government?

2. Has a state court the right to determine, upon habeas corpus, whether the Supreme Court of the United States had jurisdiction in any special case?

Mr. Justice Field, after a statement of the case, delivered the opinion of the court.

In the cases of Ableman v. Booth,* cases arising under the fugitive slave law, the Wisconsin Supreme Court held the above mentioned act unconstitutional and void, and therefore that the Federal Court had no jurisdiction.

In the case of Booth* the Supreme Court of Wisconsin held that the action of one of its justices in discharging a prisoner held in custody by a United States marshal, under warrant of commitment for an offense against the laws of the United States issued by a United States commissioner was legal.

It later discharged the same prisoner when he was in confinement under a sentence of the District Court of the United States.

These cases were later heard before the United States Supreme Court. After statement of the case, the Chief Justice gave the following opinion in answer to the assumption of judicial power by the judges of the Supreme Court of Wisconsin.

"If they possess the jurisdiction they claim, they must derive it either from the United States or the State. It certainly has not been conferred upon them by the United States; and it is equally clear it was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government, and

*Ableman v. Booth and United States v. Booth, 21 Howard 506.

although the State of Wisconsin is sovereign within the territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States * * * and the State of Wisconsin has no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offense against the laws of the State in which he was imprisoned."

The solution of the point of law in this case is found in the distinct and independent character of the government of the United States from that of the several states. Within each state there are two governments, restricted in certain directions but independent and supreme within their respective spheres; neither can interfere with actions of the other. They stand in the same relation as if their authority was exercised over distinct territory except that in case of conflict the authority of the Federal government is supreme.

"The Constitution and the laws passed in pursuance of it, are declared by the constitution itself to be the supreme law of the land, and the judges of every state are bound thereby."

In view of the conditions just stated no state can interfere with the judicial process of the Federal Government and the latter can only interfere in case of conflict of authority.

The following powers are assigned to the Federal Government: "to raise and support armies", and "to provide for the government and regulation of the land and naval forces" and its power over them is supreme. It can determine the manner of raising this force, duties to which it shall be assigned and fix regulations for its government and no interference by state officials can be permitted without loss or destruction of efficiency. If a soldier could be taken

from the army by the issuance of habeas corpus by state authorities, and the validity of his enlistment inquired into, the national government would be greatly hampered in its undertakings and officials opposed to the government could use this power to the detriment of the public service.

State officials have the power to issue the writ of habeas corpus unless it appear that the person concerned is confined under authority of the national government and if this be the case the writ should be refused. In case this writ is addressed to an officer holding a person under authority of the national government he should make a return showing the authority under which he holds the prisoner and the process or orders under which he acts should be submitted with the return.

Mr. Justice Field stated the following in the opinion:

"After the return is made, and the state judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus nor any other process issued under state authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress.

It follows, from the views we have expressed, that the court commissioner of Dane County was without jurisdiction to issue the writ of habeas corpus for the discharge of the prisoner in this case, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer of the United States, under claim and color of the authority of the United States, as an enlisted soldier

mustered into the military service of the National Government; and the same information was imparted to the commissioner by the return of the officer."

The Chief Justice dissented from this opinion stating: that he could not concur in the opinion; that he had no doubt of the right of a state court to inquire into the jurisdiction of a Federal Court upon habeas corpus and to discharge the prisoner if satisfied he was held by a court without competent jurisdiction; and that a writ of habeas corpus may issue from a state court to inquire into the validity of the detention of a prisoner by an officer of the United States.

CASES CITED

Ableman v. Booth
United States v. Booth } 21 Howard 506.
In re Spangler, 11 Michigan 299.
State v. Zulich, 5 Ducher 409.
In re Hopson, 40 Barbour 43.
In re Jordan, 11 American Law Register 749.
In the matter of Severy, 4 Clifford.
In the matter of Keeler, Hempstead 306.

In Re GRIMLEY

Supreme Court of the United States, 1890
137 U. S. 147

Prepared by Captain Manus McCloskey, 4th U. S. Field Artillery

STATEMENT OF THE CASE

John Grimley, an able bodied man over 40 years of age, was enlisted February 18, 1888. In his oath of allegiance he swore that he was 28 years old. He signed the clothing rolls, selected his uniform in the clothing room, left it there and then went out to see friends. He did not return. On the 16th of May, 1888, he was arrested as a deserter and later tried and convicted. While serving his sentence of six months at Fort Warren, he sued out a writ of habeas corpus in the U. S. District Court of Massachusetts. That court discharged him from custody. The United States appealed to the Circuit Court for the district and the Circuit Court affirmed the decree of the District Court. From this decision the United States appealed to the Supreme Court. Counsel for Grimley maintained, first, that Grimley was 40 years old, that the statutory age for original enlistments was 35 years, that the recruiting officer could not change the statutory requirement and that the enlistment was void.

Second, that the act of enlistment was not complete because the Articles of War were not read to Grimley, as required by the 2d Article, which makes such reading a condition precedent to the valid administration of the oath.

OPINION OF THE COURT

Mr. Justice Brewer delivered the opinion of the court. This opinion is frequently cited to show that enlistment is a status rather than a contract relation, and, for that reason, is quoted at some length.

The court said:

"It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and, if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence. And, on the other hand, it is equally clear that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial, and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction. That being established, the habeas corpus must be denied and the petitioner remanded. That wanting, it must be sustained and the petitioner discharged. If Grimley was an enlisted soldier he was amenable to the jurisdiction of the court-martial; and the principle question, the one ruled against the government, is whether Grimley's enlistment was void by reason of the fact that he was over 35 years of age. This case involves a matter of contractual relation between the parties; and the law of contracts, as applicable thereto, is worthy of notice. The government, as contracting party, offers contract and service. Grimley accepts such contract declaring that he possesses all the qualifications prescribed in the government's offer. The contract is duly signed. Grimley has made an untrue statement inregard to his qualifications. The government makes no objections because of the untruth. The qualification is one for the benefit of the government, one of the contracting parties. Who can take advantage of Grimley's lack of qualification? Obviously only the party for whose benefit it was inserted. Such is the ordinary law of contracts. * * * * On the other hand, suppose for any reason it could be contended that the proviso as to age was for the benefit of the party enlisting, is Grimley in any better posi-

tion? The matter of age is merely incidental, and not of substance of the contract; and can a party by false representations as to such incidental matter obtain a contract, and thereafter disown and repudiate its obligation on the simple ground that the fact in reference to this incidental matter was contrary to his representations? May he utter a falsehood to acquire a contract, and plead the truth to avoid it, when the matter in respect to which the falsehood is stated is for his benefit? It must be noted here that in the present contract is involved no matter of duress, imposition, ignorance or intoxication. Grimley was sober, and of his own volition went to the recruiting office and enlisted. There was no compulsion, no solicitation, no misrepresentation. A man of mature years, he entered freely into the contract.

"But in this transaction something more is involved than the making of a contract, whose breach exposes to an action for damages. Enlistment is a contract; but it is one of those contracts which changes the status, and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. Marriage is a contract, but it is one which creates a status. Its contract obligations are mutual faithfulness; but a breach of those obligations does not destroy the status or change the relation of the parties to each other. The parties remain husband and wife, no matter what their conduct to each other—no matter how great their disregard of marital obligations. It is true that courts have power, under the statutes of most states, to terminate those contract obligations, and put an end to the marital relations. But this is never done at the instance of the wrongdoer. The injured party, and the injured party alone, can obtain relief and a change of status by judicial action. So, also, a foreigner by naturalization enters into new obligations. More than that, he thereby changes his status; he ceases to be an alien and becomes a citizen, and when that change is once accomplished it is not destroyed by the mere misconduct of one of the parties, and the guilty party cannot plead his own wrong as working a

termination and destruction thereof. Especially is he debarred from pleading the existence of facts personal to himself, existing before the change of status, the entrance into new relations, which would have excused him from entering into those relations and making the change, or if disclosed to the other party, would have led it to decline admission into the relation, or consent to the change.

"By enlistment the citizen becomes a soldier. His relations to the state and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the state not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the state, would not have entered into the new relations with him, or permitted him to change his status. * * * * The government has the right to the military service of all its able-bodied citizens; and may, when emergency arises, justly exact that service from all. And if, for its own convenience, and with a view to the selection of the best material, it has fixed the age at 35, it is a matter which in any given case it may waive; and it does not lie in the mouth of any one above that age, on that account alone, to demand release from an obligation voluntarily assumed, and discharge from a service voluntarily entered into. The government, and the government alone, is the party to the transaction that can raise objections on that ground. We conclude, therefore, that the age of the petitioner was no ground for his discharge."

With reference to the enlistment being complete without the reading of the Articles of War, the court said:

" 'These rules and articles shall be read to every enlisted man at the time of, or within six days after his enlistment, and he shall thereupon take an oath or affirmation', etc. Obviously the oath is the final act in the matter of enlistment. Article 47, respecting desertion, reads: 'Any officer or soldier who,

having received pay, or having been duly enlisted in the service of the United States, deserts the same', etc. By this either receipt of pay or enlistment determines the status; and after enlistment the party becomes amenable to military jurisdiction, although no actual service may have been rendered and no pay received.

It is insisted that the Articles of War were not read to him; but that is not prerequisite. 'Within six days after' is the statute. The reading of the 128 articles, many of which do not concern the duty of a soldier, is not essential to his enlistment. * * * * We conclude, therefore, upon the whole case, that the age of the petitioner was no bar to his enlistment of which he can take advantage; that the taking of the oath of allegiance is the pivotal fact which changes the status from that of the civilian to that of the soldier; that the enlistment was a deliberate act on the part of the petitioner; and that the circumstances surrounding it were not such as would enable him, of his own volition, to ignore it, or justify a court in setting it aside.

"The judgment of the Circuit Court will be reversed and the case remanded with instructions to reverse the decree of the District Court and take such further proceedings as shall be in conformity with the opinion of this court."

In Re MORRISSEY

Supreme Court of the United States, 1890
137 U. S. 157

Prepared by Captain Manus McCloskey, 4th U. S. Field Artillery

STATEMENT OF THE CASE

The circumstances of the case are cited in the opinion which follows:

OPINION OF THE COURT

Mr. Justice Brewer in delivering the opinion of the court said:

"This case, appealed from the Circuit Court for the Eastern District of Missouri, presents like that of Grimley, Petitioner, just decided, a question arising on habeas corpus as to the rights of the petitioner, an enlisted soldier, to be discharged from military custody. An effort was made to bring this case here by writ of error; but that was abandoned, and an appeal rightfully substituted. (In re Neagle, 135 U. S. 1, 42.) The facts differ from those in Grimley's case, in this: the petitioner was seventeen years of age, and had a mother living who did not consent to his enlistment. Upon his enlistment he drew from the United States his uniform and equipments, and continued in actual service from the 23d day of August to the 13th day of September, 1883, when he deserted. He remained in concealment until February, 1889, at which time he had become of age, and then appeared at a recruiting office and demanded his discharge from the army on the grounds that he was a minor when enlisted. In his oath of allegiance he swore that he was twenty-one years and five months old. It will be seen that the petitioner was within the ages prescribed by section 1116 of the Revised Statutes, to writ, sixteen

and thirty-five years. Section 1117 provides that 'no person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardian: Provided, That such minor has such parents or guardian entitled to his custody and control.' But this provision is for the benefit of the parent or guardian. It means simply that the government will not disturb the control of the parent or guardian over his or her child without consent. It gives the right of parent or guardian to invoke the aid of the court and secure the restoration of a minor to his or her control; but it gives no privilege to the minor.

"The age at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the legislature. United States v. Bainbridge, 1 Mason 71; Wassum v. Feeney, 121 Mass. 93, 95. Congress has declared that minors over the age of sixteen are capable for military service, and undertaking and performing its duties.

"An enlistment is not a contract only, but effects a change of status. Grimley's Case, ante, 147. It is not, therefore, like an ordinary contract, voidable by the infant. At common law an enlistment was not voidable either by the infant or by his parents or guardian. The King v. The Inhabitants of Rotherford Greys, 2 Dow. & Ryl. 628, 634; S. C., 1 B. & C. 345, 350; The King v. The Inhabitants of Lytchet Matravers, 1 Man. & Ryl. 25, 31; S. C., 7 B. & C. 226, 231; Commonwealth v. Gamble, 11 S. & R. 93; United States v. Blakeney, 3 Grattun 405, 411-413.

"In this case the parent never insisted upon her right of custody and control; and the fact that he had a mother living at the time is, therefore, immaterial. The contract of enlistment was good so far as the petitioner is concerned. He was not only de facto, but de jure, a soldier—amenable to military jurisdiction. His mother not interfering, he was bound to remain in the service. His desertion and concealment for five years did not relieve him from his obligations as a soldier, or his liability to military control. The order of the Circuit Court remanding him to the custody of the appellee was correct and must be affirmed."

LIST OF CASES CITED

U. S. SUPREME COURT

In re Neagle, 135 U. S. 1.
In re Grimley, 137 U. S. 147.

FEDERAL REPORTER

U. S. v. Bainbridge, 1 Mason 71.

STATE

Wassum v. Feeney, 121 Mass. 93, 95.
Commonwealth v. Gamble, 11 S. & R. 93.
U. S. v. Blakeney, 3 Grattan 405, 411-413.

BRITISH

The King v. The Inhabitants of Rotherford Greys, 2 Dow. & Ryl. 628, 634; S. C., 1 B. & C. 345, 350.

The King v. The Inhabitants of Lytchet Matravers, 1 Man. & Ryl. 25, 31; S. C., 7 B. & C. 226, 231.

In Re DAVISON

Circuit Court, S. D. New York, 1884. 21 Federal Reporter 618

Prepared by Captain Manus McCloskey, 4th U. S. Field Artillery

STATEMENT OF THE CASE

Davison, a civilian, aged 19, enlisted in the U.S. Army in July, 1870, for 5 years, without his mother's consent, she being dependent upon him for support. He deserted while on furlough in February, 1872, was apprehended and brought to Fort Columbus in October, 1880, and while in confinement at the post awaiting trial by G.C.M. was ordered discharged from custody by the District Judge of New York on habeas corpus.

An appeal to review the decision was brought to the Circuit Court, S. D. New York.

It appeared that Davison was in New York during the entire time from his desertion to apprehension. His discharge was claimed on two grounds, 1. That his contract of enlistment was void and therefore he could not be held as a deserter. 2. That if a deserter he was not amenable to trial because more than two years had elapsed since the commission of the alleged offense.

It will be noted here that the 103d Article of War in force in 1884 at time of the decision was amended in 1890 to its present condition, i.e. the two year limit in case of desertion in time of peace begins at end of term for which the deserter enlisted.

OPINION OF THE COURT

In considering the first question, viz., that Davison was a minor enlisted without his parent's consent and his enlistment was therefore void, the court say:

"The provisions of the laws of Congress in force at the time of the relator's enlistment, so far as they affect the point, are reproduced in Sections 1116, 1117 and 1118, Revised Statutes.

Section 1116 is as follows:

"Recruits enlisting in the army must be effective and able-bodied men, and between the ages of 16 and 35 years at the time of their enlistment."

Section 1117 enacts:

"No person under the age of 21 years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, provided that such minor has such parents or guardians entitled to his custody and control."

Section 1118 enacts:

"No minor under the age of 16 years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of a felony, shall be enlisted or mustered into the military service.

"The reasonable conclusion warranted by these sections would seem to be that the contract of enlistment of a minor under 16 years of age is void; but that if he is over that age it is valid, in the absence of fraud or duress as to him, but during his minority is invalid at the election of his parents or guardian."

Continuing the court say:

"The case of Menzes v. Camac, 1 Serg. & R. 87, arising under the act of March 16, 1802, is directly in point. The statute in that case was similar in its provisions to section 1117, and the court held the

minor bound by his contract; that the parent alone could assert its invalidity; and therefore refused to discharge the minor upon habeas corpus at his own application."

In considering the second question, namely, that if Davison was a deserter he was not amenable to trial, because more than two years had elapsed since the commission of the alleged offense, the court say:

"It must be held that it is for the court-martial and not this court to decide whether the statutory limitation can be invoked effectively by the accused to protect him from punishment. If the petitioner was legally in custody awaiting trial by court-martial for a military offense, this proceeding must fail. He was legally in custody if the offense is one of which that tribunal has jurisdiction. It is not the office of a writ of habeas corpus to anticipate the action of the appropriate tribunal by determining, in advance of its investigations and judgment, whether the accused is innocent or guilty of the offense for which he is held for trial, any more than it is to perform the functions of a writ of error after a trial has been had. Courts-martial are lawful tribunals existing by the same authority that this court is created by, have as plenary jurisdiction over offenses by the law military as this court has over the controversies committed to its cognizance, and within their special and more limited sphere are entitled to as untrammeled an exercise of their powers. * * * * * * *

"The question of the jurisdiction of a general court-martial may always be inquired into upon the application of any party aggrieved by its proceedings, and so may that of every judicial tribunal; but the range and scope of the inquiry is controlled by the same rules and limitations in both cases. There must be jurisdiction to hear and determine, and to render the particular judgment or sentence imposed. If this exists, however erroneous the proceedings may be they cannot be reviewed collaterally upon habeas corpus. * * * * * * * * * * *
Although Article 102 declares that no person shall be 'liable to be tried and punished' by a general court-

martial for an offense which appears not to have been committed within two years, this language does not limit or qualify the jurisdiction of military tribunals, but prescribes a rule of procedure for the benefit of the accused, to be considered and enforced upon the trial, in the exercise of a jurisdiction already conferred. The limitation is a matter of defense, which is to be entertained and determined like any other question involving an adjudication upon the merits of the case."

The court then cites In Re White, 17 Fed. Rep. 723:

"It was there held, on a proceeding in habeas corpus, that the limitation prescribed by Article 103 is a matter of defense, and that the court-martial was the tribunal having jurisdiction to try the charge of desertion, and to determine whether the limitation attached or not; and because of these conclusions the court refused to discharge the relator, and remanded him to be dealt with by the military authorities."

The court reversed the decision of the District Court and remanded Davison to the military authorities, discharging the writ of habeas corpus.

LIST OF CASES CITED

FEDERAL REPORTER

In re White, 17 Fed. 723.

STATES.

Menzes v. Comas, 1 Serg. & R 87.

UNITED STATES v. CLARK

Circuit Court, E. D. Michigan, 1887, 31 Federal Reporter 710

Prepared by Captain N. F. McClure, 5th U. S. Cavalry

STATEMENT OF THE CASE

On complaint before the district judge, as committing magistrate, for murder upon the Fort Wayne military reservation.

"Arthur Stone, the deceased, was a private soldier of Company I, Twenty-third Regiment, United States Infantry, and, at the time of the homicide, was under conviction of a court-martial for 'conduct prejudicial to good order and military discipline', and had been sentenced, 'to be dishonorably discharged the service of the United States, forfeiting all pay and allowances due or to become due, and to be confined at hard labor, at such military prison as the reviewing authority may direct, for two years.' The prisoner was the sergeant of the guard having him in custody at the time. On the eleventh day of July, at 'retreat', all the prisoners in the guard-house, six in number, had been taken out of the guard-house for roll-call and inspection, and were standing in a line, with their backs to the guard-house, in charge of a squad of armed soldiers. As Lieut. Wieton, officer of the day, and the present prisoner, the sergeant of the guard, were entering the guard-house, to inspect it, and just as the prisoner was crossing the threshold of the outer door, deceased, who was standing at the end of the line of prisoners, broke from the ranks, ran around the corner of a fence in line with the guard-house, and towards the public highway in front of the military

reserve, from which it was separated by a board fence about six feet in height. As he left the ranks, an outcry was raised, and the quartermaster sergeant, who happened to see the escape, and a private by the name of Duff, started in pursuit, calling upon him to halt; the sergeant adding, 'There is a load after you.' Clark, hearing the outcry, turned and seized a cartridge from his box, hastily loaded his musket, and ran around the guard-house in the direction which Stone had taken. At this time Stone was about 30 yards ahead of his nearest pursuer, Duff, who did not seem to be gaining upon him, and stood little if any chance of overtaking him before he could gain the street. Just as he was crossing a military road within the reserve, and about to leap a rail fence parallel with this road, and about 35 yards from the outer fence, and about 80 yards from the guard-house, Clark fired, and hit Stone in the back just above the hips, inflicting a wound from which he died in the course of the evening. No ill feeling existed between the men; in fact they had always been upon very friendly terms, and it was at least doubtful whether Clark knew it was Stone when he fired."

POINTS OF LAW INVOLVED

1. Have the Circuit Courts of the United States jurisdiction of homicides committed by one soldier upon another within a military reservation of the United States?

2. If homicide is committed by a soldier or officer, while a member of a guard, without malice and in the performance of what he believes to be his duty, is such killing excusable, unless it was done manifestly outside of his authority or was such that a man of reasonable sense and understanding would know that it was contrary to law?

3 Is a member of a military guard justified in shooting a military convict if there be no other possible means of preventing his escape?

4. In military offenses, is there any distinction

between felonies and misdemeanors such as is found at the common law?

5. Does the finding of the Court of Inquiry, acquitting an officer or enlisted man of all blame for a homicide against a military prisoner killed while attempting to escape, legally bar prosecution in a civil court? If not, what weight should such an acquittal have before a civil court, if any?

OPINION OF THE COURT
(*Somewhat condensed*)

The court at first had some doubt as to whether this homicide committed on a military reservation of the United States by a soldier against a former soldier who at the time was a military convict, could be taken cognizance of by a civil court.

But, upon further consideration, the court did not consider that it could refuse to hear the complaint for the reason that to do so would be to abdicate that supremacy of the civil power which is a fundamental principle of the Anglo-Saxon polity.

While there is no status expressly conferring such jurisdiction, there is a clear recognition of it in the 59th Article of War. This article of war makes no exception of crimes committed by one soldier upon another, nor in cases where there is concurrent jurisdiction in the military courts. The subject of the civil responsibility of the army was very carefully considered by the Attorney General of the United States in Steiner's Case (6 Op. Atty. Gen. 413) and the conclusion reached that an act criminal by both military and general law is subject to be tried either by a military or a civil court and that a conviction or acquittal by the civil authority of the offense against the general law does not discharge from responsibility for the military offense involved in the same facts. The converse of this proposition is equally true.

There is no doubt but that the deceased was killed by the prisoner under the performance of a supposed obligation to prevent his escape by any means in his power. There is no evidence that the accused fired before the necessity for his doing so became apparent. Stone was called upon several times to halt.

A court of inquiry, called to investigate the matter, was of the opinion that the shooting was justifiable and that if Clark had not performed his duties so efficiently, the prisoner would have escaped. The accused's reputation was good and he was friendly with the deceased. It is doubtful if Clark recognized him at the time he shot him.

Clark says that he aimed low to disable and not kill, but that a depression in the ground, which Stone was passing over, caused the latter to be hit in the back. For the purposes of this examination the court is bound, however, to presume that Clark intended to kill the deceased since every one is presumed to intend the natural and probable consequences of his act. The question then is, was the accused justifiable in law in killing the deceased?

The general rule is that an officer having custody of a person charged with felony may take his life if it becomes absolutely necessary to prevent his escape. It is doubtful if this would be strictly applicable at the present day. For example, it would be hardly justifiable for an officer to kill a man charged with petit larceny though that crime is a felony at common law. In military law that distinction between felonies and misdemeanors, found in common law, does not exist.

There is no such crime at common law as that of which the deceased was convicted, viz: "conduct to the prejudice of good order and military discipline." It would be extremely unwise for the civil courts to

lay down general principles of the law which would tend to impair the efficiency of the military arm. An army is a necessity—perhaps I ought to say an unfortunate necessity—under every system of government. To insure efficiency an army must be, to a certain extent, a despotism. Each officer from the general down to the corporal is invested with arbitary power over those beneath him and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers.

The articles of war, to observe which he takes an oath on enlistment, are a code of Draconic severity and authorize harsh punishments for some offenses which seem to be of a trivial nature to civilians.

The 62d Article of War provides for the punishment of all crimes not capital and all disorders and neglects to the prejudice of good order and military discipline by a court-martial at the discretion of said court.

The deceased was found guilty under the latter article of war and was sentenced to two years' imprisonment in a military prison. In trying to escape, he was again guilty of "conduct to the prejudice of good order and military discipline."

Had the accused suffered him to escape he himself would have been amenable to punishment under the 62d Article of War, unless he used his utmost endeavors to prevent such escape. Did he exceed his authority in using his musket?

While human life is sacred, and the man who takes it is held strictly accountable for his act, a reputable citizen, who certainly does not lose his character as such by enlisting in the army, ought not to be branded as a murderer upon a mere technicality

unless such technicality be so clear as to admit of no reasonable doubt.

In this connection, it is urged by the defense that the finding by the court of inquiry acquitting the accused of all blame is a complete bar to this prosecution. The court does not so regard it. If the civil courts have jurisdiction of murder, notwithstanding the concurrent jurisdiction by courts-martial of military offenses, it follows logically that the proceedings in one cannot be pleaded as a bar to proceedings in the other. At the same time I think that great weight should be given, in a case of this kind, to the finding as an expression of the opinion of the military court of the magnitude of Stone's offense and the necessity of using a musket to prevent Stone's escape.

In the case Wilkes vs. Dinsman, Mr. Justice Woodbury says:

"The officer, being intrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him, either that he exercised the power confided to him in cases without his jurisdiction, or in a manner not confided to him, as, with malice, cruelty or willful oppression, or, in the words of Lord Mansfield, that he exercised it as if 'the heart is wrong.' In short, it is not enough to show that he committed an error in judgment but it must have been a malicious and wilful error."

As the evidence shows that there is no reason to believe that Clark was not doing what he believed to be his duty, and the act was not so clearly illegal that a a reasonable man might not suppose it to be legal, —in fact this court is of the opinion that it was legal—and as there was an entire absence of malice, it is believed that he ought to be discharged.

But even if the case was decided upon common law principles the result would not be different. By

the analogies of law, Stone must be considered as having been convicted of a felony. This accused was therefore justified in using means to prevent his escape. The court therefore assumes the responsibility of directing his discharge.

It will thus be seen that the court decided the 1st, 2d and 3d questions in the affirmative and the 4th in the negative. In discussing the 5th question, the Court arrives at the conclusion that the finding of a Court of Inquiry, acquitting an officer or soldier of all blame for a homicide against a military prisoner trying to escape, is not a legal bar to prosecution in a civil court, but that such a finding is of great weight before a civil court. In other words, it is expert opinion as to the facts in the case. The decision of the Court on all these points is excellent law and has been of great assistance to the army in administering discipline in the last two decades.

True, the court does not seem to have a very clear idea of the legal status and legal force of the deliberations of a court of inquiry. But if we stop to investigate this, the reasons for it are not hard to find. Twenty-five years ago, not only was the army small, but the greater part of it was scattered over the frontier at remote military posts. Judges of civil courts, in those days, could hardly be expected to keep at their fingers ends, a system of jurisprudence which they were seldom, if ever, to be called upon to apply. The cases involving points of military law, appearing on the dockets of the civil courts, were few indeed. That important decisions were few and far between is evidenced also by the satisfaction with which we of the military seized upon an opinion favoring the enforcement of order and discipline, and cherished and nurtured it until some learned court or judge, like the one in this case, extended us another helping hand.

Let us now take up the questions decided in the case of United States vs. Clark:

1st. Have the Circuit Courts of the United States jurisdiction of homicides committed by one soldier upon another on a military reservation?

The court say, yes. This decision has been further strengthened by the decision in the Grafton case, in which it is stated in substance that, under the 62d Article of War, general courts-martial may take cognizance of all crimes not capital committed against the law by an officer or enlisted man of the army within the limits of the territory or district in which he is serving; that this jurisdiction is not exclusive but concurrent with that of the civil courts of the United States; and that if a court-martial first acquires jurisdiction, its judgment cannot be ignored by the civil courts of the United States for a mere error, or for any reasons other than those affecting the jurisdiction of the court arriving at said judgment.

The same act, constituting an offense against the United States, cannot, after the acquittal or conviction of the accused, in a court of competent jurisdiction, be made grounds for another trial of the accused for the same offense in the same or in another court, civil or military, of the same government.

Although when committed in a state, the same act might constitute two distinct offenses, one against the United States and one against the state, for both of which the accused might be brought to trial, still this rule does not apply where all the courts, civil and military, derive their authority from the United States. The reason for this is that the government of a state does not derive its power from the United States, whereas the government of

the Philippine Islands owes its existence wholly to the United States.

From this we see that, in all cases of offenses against laws of the United States, committed either without or within a state on a military reservation by an officer or soldier of the army, the Circuit Courts of the United States have concurrent jurisdiction with the military courts.

This whole subject will be found treated in detail in the Grafton case (206 U. S. 333).

2d and *3d*. These questions may both be discussed under one head: Is a homicide committed by an officer or an enlisted man while a member of a guard to prevent the escape of a military prisoner justifiable if the escape could have been prevented in no other way?

The consensus of opinion now is that such a homicide is justifiable where the circumstances are such that a man of reasonable sense would consider such a killing lawful. If there is no cause to believe that he had malice against the person shot and he is acting entirely within his authority, either in obedience to the orders of a superior or from what he believes to be a sense of duty, he will be held blameless.

4th. Is there any distinction in military offenses similar to that between felonies and misdemeanors at common law?

The answer as interpreted by this case is negative. All offenses at military law are crimes (see Winthrop, 148, 149, 1040), and, as a rule, no distinctions or gradations similar to those found at common law and in statutory law are considered in military practice.

Because, as a rule, courts of the United States are statutory and have no common law practice as such, and as the practice is not uniform in the

United States, it will be seen that it would be necessary for Congress to define what would be misdemeanors and what felonies, and the different grades of felony. Congress has usually not done this, and consequently the military authorities, in the administration of military law, are spared the solution of many vexatious problems.

Thus, there is no murder of the first degree, nor murder of the second degree, nor accessaries before the fact, nor accessaries after the fact, nor grand larceny, nor petit larceny, etc.

5th. I do not consider further discussion of this question necessary. I refer the reader to Winthrop, Vol. I, page 797, Edition of 1896.

The finding of a court of inquiry is not a plea in bar of trial, but may be admitted in evidence as an expression of expert opinion in cases similar to the one before us.

There was no minority opinion in this case. As Judge Brown heard the case alone, it was impracticable to have a minority opinion.

Hereto is appended a list of the principal cases cited in or analogous to United States vs. Clark.

LIST OF CASES CITED

U. S. SUPREME COURT

Grafton Case, 206 U. S. 333.
Drury vs. Lewis, 200 U. S. 1.
Ohio vs. Thomas, 173 U. S. 276.
In Re Neagle, 135 U. S. 1.
Ex Parte Royal, 117 U. S. 241.
Tenn. vs. Davis, 100 U. S. 257.
Bates vs. Clark, 95 U. S. 204.
Wilkes vs. Dinsman, 7 How. 89.

FEDERAL REPORTER

Drury vs. Lewis, 129 Fed. R. 823.
Campbell vs. Waite, 88 Fed. R. 102.
In Re Waite (see Campbell vs. Waite), 81 Fed. R. 359.
In Re Fair, 100 Fed. R. 149.
In Re Lewis, 83 Fed. R. 159.

OPINIONS ATTORNEY GENERAL

Steiner's Case, 6 Op. Att. Gen. 413.

In Re FAIR

Circuit Court, D. Nebraska, 1900. 100 Federal Reporter 149

Prepared by Captain T.Q. Donaldson, jr., 8th Cavalry

STATEMENT OF THE CASE

Samuel Morgan, an enlisted man of Troop A, 8th U. S. Cavalry was held a prisoner at Fort Crook, Nebraska, under the charge of having deserted from his troop on the 7th of September, 1898.

On the 17th of November, 1899, Morgan and another prisoner, named Deacon, while being guarded at Fort Crook by a sentinel, overpowered the latter, dismantled his gun and attempted to escape. Sergeant William M. Simpson, Company M, 10th Infantry, sergeant of the guard, ordered Corporal John S. Fair and Private Henry H. Jockens, of the same company and also members of the guard, to pursue and arrest the two fleeing prisoners, the order being in substance as follows: "Pursue the prisoners. If you sight them, and are positive it is the right party, halt them; and, if they do not halt, halt them a second time; and, if they do not halt, then fire upon them, and fire to hit them."

Fair and Jockens pursued the prisoners across country and finally arrived at the village of La Platte, some three miles from Fort Crook, having in the meantime lost sight of them.

Fair immediately tried to find a constable or other peace officer in the place but found there was none. He then notified the officer of the day at Fort Crook, by telephone, that he and Jockens were in La Platte

and that he believed the prisoners were in the vicinity. The officer of the day, Lieut. Welch, then ordered him to notify the civil authorities, and Fair told him there was no peace officer in the town.

A few minutes after this, while Fair and Jockens were standing in the road trying to obtain some information about the prisoners, Morgan passed them on the opposite side of the road.

It was the dusk of the evening and Morgan was dressed in civilian clothes and Fair and Jockens were not certain of his identity, but they ordered him to halt. He paid no attention to the command but continued to move on at a rapid walk. He was ordered the second time to halt when he turned towards them and said, "What in hell do you want?" Fair replied, "We want you to halt."

Morgan then began to run, bending his body down. He was again ordered to halt, but paid no attention to the command and continued to run. Thereupon Corporal Fair gave the command to fire and both Fair and Jockens fired. Morgan was hit and died a few minutes afterwards.

Both Fair and Jockens were tried before a general court-martial at Fort Crook on the charge of "manslaughter, to the prejudice of good order and military discipline," found not guilty and acquitted. A complaint was then made in due form before the county judge of Sarpy county, Neb., charging Fair and Jockens with the crime of murder in the killing of Morgan.

They were arrested, examined by the county judge, and both held for trial in the state district court of Sarpy county and their bail fixed at $1,000 each. They were unable to give this bail and were turned over to the custody of the county sheriff.

They then went before the U. S. Circuit Court, District of Nebraska, on a writ of habeas corpus,

petitioning their release under the claim that their imprisonment was without authority of law.

POINTS OF LAW TO BE DECIDED

In the language of Judge Munger, who was the district judge:

"The principal question to be determined is, has the state court, within and for the county of Sarpy, Neb., jurisdiction to try petitioners for such killing of Morgan as a violation of the laws of the state. If the killing of Morgan was an act violative of the laws of the state, then the state court has jurisdiction, and the petitioners must be remanded to the custody of the sheriff. If, on the other hand, such killing of Morgan was not a violation of the laws of the state, then the state court is without jurisdiction, and the petitioners should be discharged."

The judge also said that the following two principles of law were so well established as not to need extended citations of authorities to support them:

"1st, that the trial and acquittal of petitioners by the court-martial is not a bar to an inquiry and prosecution by the proper civil authorities. [1]

"2d, that an act done by an officer or agent of the United States in and about a matter solely within federal control, and in pursuance of authority given by the laws of the United States, is not an offense against the laws of the state. [2]

"Neither can it be denied that when an officer or agent is held in custody by the process of a state court for an act done within the authority conferred on him by the laws of the United States, the United States government may protect itself by procuring the release of such officer through its judicial department. (Justice Strong in Tennessee v. Davis, and Chief Justice Marshal in Osborn v. Bank." [3]

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[1] Coleman v. Tennessee, 97 U. S. 506, 24 L. Ed. 1118; U. S. v. Clark (C.C.) 31 Fed. 710.

[2] Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 35.

[3] 100 U. S. 257, 25 L. Ed, 648; 9 Wheat, 865, 6 L. Ed. 234.

DISCUSSION OF THE CASE AND OPINION OF THE COURT

The first question considered was, were the petitioners, when Morgan was shot, acting in the line of duty as soldiers of the army?

In considering this question, the court reviewed the 47th, 66th, and 48th Articles of War. In the first, desertion is shown to be a serious crime against the United States, punishable only by a court-martial; in the second, that soldiers charged with crime shall be confined until tried by court-martial or released by proper authority; and, in the third, that every deserter shall be tried by a court-martial and punished, although his enlistment may have elapsed prior to his apprehension and trial

It was shown in the evidence that Morgan was a deserter, that he had been arrested, and by overpowering the guard had attempted escape. Clearly, then, he was subject to arrest for the purpose of being tried by a court-martial.

The second question considered was, were the petitioners authorized to arrest Morgan?

In considering this question, the court cited authorities to show that military officers, and non-commissioned officers and privates, when duly authorized, can arrest deserters[1] and that prior to October 1, 1890, no peace officer or private citizen had the right to arrest or detain a deserter.[2] The act of the above mentioned date conferred the power on the civil authorities in the following language:

"That it shall be lawful for any civil officer having authority under the laws of the United States, or of any state, territory or district, to arrest offenders, to summarily arrest a deserter from the military

[1] Davis, Mil. Law 425; Winthrop, Mil. Law. 173; Hutchens v. Van Bokkelen, 34 Me. 126.

[2] Kurtz v. Moffitt, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458.

service of the United States and deliver him into the the custody of the military authorities of the general government".

The state claimed that this act took away the authority previously held by military officers, non-commissioned officers and privates. On this the court said:

"To this I cannot agree. I do not think Congress, by giving permission to civil officers to make arrests of deserters, intended to take away the authority then existing to make such arrests on the part of the officers of the army, but that the act was intended to enable civil authorities to aid and assist the military in apprehending deserters. While Congress might confer upon the civil authorities of the various states authority to make arrests of deserters against military law, it is equally clear that the duty to make arrests could not be imposed upon such authorities."

He found, therefore, that the petitioners had the lawful authority to apprehend Morgan.

The question considered was whether the petitioners had the right to shoot Morgan in the attempt to secure his arrest. And, if not, was the shooting a crime against the laws of the State?

In discussing this question, the court referred to the 69th Article of War which provides for the punishment of an officer by court-martial who permits a prisoner to escape. Also to numerous regulations and orders of the Secretary of War, which he declared had the force and effect of statutory law. He quoted as follows:

"The power of the executive to establish rules and regulations for the government of the army is undoubted. * * * The power to establish implies, necessarily, the power to modify or repeal, or to create anew. The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation, and rules and orders publicly promulgated through him must

be received as the acts of executive, and, as such, be binding upon all, within the sphere of his legal aud constitutional authority. Such regulations cannot be questioned or denied because they may be thought unwise or mistaken." [1]

Then followed quotations from the Manual of Guard Duty. [2] The court said that although the construction placed by the commanding officer of a military department upon the Articles of War and the regulations of the executive, promulgated by the Secretary, was not binding on the judicial department, yet such construction was entitled to great weight, and to the non-commissioned officer and private should be unquestioned and should afford them full protection when they act in accordance therewith.

The point was here made by the state that the rule above stated applied only to attempted escapes and not to the present case where Morgan had actual ly made his escape.

The court held that, even granting this, the rule was still material in determining whether the order of Sergeant Simpson to shoot if the command halt was not obeyed was one which should have been disregarded by the petitioners.

"The law is that an order given by an officer to his private, which does not clearly and expressly show on its face its own illegality, the soldier is bound to obey, and such order is his full protection." [3]

"While I do not say that the order given by Sergeant Simpson to petitioners was in all particulars a lawful order, I do say that the illegality of the order, if illegal it was, was not so much so as to be apparent and palpable to the commonest understanding. If, then, the petitioners acted under such

[1] U. S. v. Eliason, 16 Pet. 291, 10 L. Ed. 968.

[2] Par. 297, (Old Manual); Cir. No. 3 of 1883, Hdqrs. Dept. Columbia, page 79 New Manual Guard Duty.

[3] Riggs vs. State, 3 Cold. 85; McCall vs. McDowell, Fed. Case No. 8573; U. S. vs. Clark (C. C.), 31 Fed. 710; In Re Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636.

order in good faith, without any criminal intent, but with an honest purpose to perform a supposed duty, they are not liable to prosecution under the criminal laws of the state."[1]

"The evidence in this case shows that the petitioners acted entirely without malice; that the conditions existing at the place and time of the shooting were such as to cause an honest belief on their part that Morgan would, in all probability, effect his escape unless disabled; that they did not shoot with a purpose of killing, but only to disable. I am mindful of the rule of law that in a habeas corpus proceeding the court will not examine the evidence for the purpose of determining whether the party should be pronounced guilty or innocent of the offense for which he is imprisoned; yet in a case of this character, it is not only proper but necessary for the court to determine whether the parties acted wantonly and with criminal intent, or whether their acts, though wrongful, were errors of judgment only.

"If they acted wantonly, with a criminal intent, then they were not acting within the scope of the authority conferred by the laws of the United States. On the other hand, if they acted without any criminal intent, but in an honest belief that they were only discharging the duties of a soldier, then their offense, if offense it was, was not against the laws of the state, and in such case the state has no jurisdiction. Petitioners were charged with the duty of arresting Morgan, a deserter from the army of the United States, who had escaped, or was attempting to escape, from confinement therefor, and, if what they did was in the honest belief that they were discharging their duty, they are not answerable to the criminal laws of the state."

The court here quoted from Judge Shiras[2] in support of this statement, in substance as follows: That when an officer is acting under the laws of the United States in the performance of his official duties

[1] In Re Lewis (D. C.), 83 Fed. 159.

[2] In Re Waite (D. C.), 81 Fed. 359, 31 C. C. A. 403, 88 Fed. 102.

and does acts which are claimed to be in excess of his authority, or to be in violation of private rights, he is not amenable to the laws or courts of a state in a criminal prosecution. If the acts committed violate the rights of individuals, a civil action for damages may be maintained, or protection sought under the laws of the United States. In either case it is the United States and not the state government that must apply the remedy.

The court, continuing, stated that there was another point requiring consideration, and that was that the act done by the petitioners being an attempt to enforce a military law of the United States, a subject over which the state had no control or concern, state statutes could have no application thereto.

In support of this, the court quoted again from the above mentioned authority:

"It will not be questioned that to sustain a criminal prosecution the statute upon which it is based must be binding upon the person and applicable to the acts which form the basis of the prosecution. If, when the acts were done, the same were not within the plane of the jurisdiction of the state, then the statute of the state has no application thereto, and it cannot be predicated of the acts that they constitute violations of the statutes of the state."[1]

It has been held that the state courts have no jurisdiction of the crime of perjury committed in an examination before a United States commissioner; in testifying before a commissioner of the Circuit Court of the United States; in making affidavits under the acts of Congress relating to the sale of public lands; in testifying before a public state notary in regard to a contested election of a member of the United States House of Representatives.[2]

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[1]Ohio vs. Thomas, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. Ed. 699.

[2]State vs. Pike, 15 N. H. 83; Ex Parte Bridges, 2 Woods 428, Fed. Case No. 1862; State vs. Shelley, 11 Lea 594; Ross vs. State, 55 Ga. 1.

The court held that the decisions referred to were directly applicable to the case at bar. The petitioners were acting for the United States, under its military authority—a subject which, by the Constitution, is solely under control of the general government. The state, therefore, cannot through any of its departments, regulate or limit the powers of the United States in regard thereto. Nor is the state concerned with the wisdom, justness, or expediency of the military laws, rules and regulations adopted by the United States, nor can their proper enforcement be measured and determined by state laws.

"To require the petitioners to answer for their acts to the state courts is to permit the state courts to administer the military laws of the United States; to determine in a criminal proceeding the extent of authority possessed by the soldiers under those laws; to say when, and under what circumstances, the subordinate may disregard and disobey the orders and commands of his superior officers; to determine the amount of force which the United States may use to apprehend one charged with a military offense; in short, to nullify the rules and regulations adopted to insure the efficiency of the military service. As said by Mr. Justice Brown, when on the bench, in U. S. v. Clark:

" ' * * * An army is a necessity—perhaps I should say an unfortunate necessity—under every system of government, and no civilized state in modern times has been able to dispense with one. To insure efficiency, an army must be, to a certain extent, a despotism. Each officer, from the general to the corporal, is invested with an arbitrary power over those beneath him, and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment; and consents to go and come at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offenses unknown to civil law, to relinquish his rights to trial by jury, and to receive punishment

which, to the civilian, seems out of all proportion to the magnitude of the offense.' "

DECISION OF THE COURT

"Finding, as I do, that the act of the petitioners in the shooting of Morgan, under the circumstances as shown by the evidence, was an act done in the performance of their duty as soldiers of the United States, it follows that the state courts are without jurisdiction in a criminal proceeding to determine whether they exercised proper care, judgment, and discretion in the discharge of that duty. For this reason the imprisonment of petitioners is in violation of their rights under the Constitution of the United States, and they are entitled to their discharge."

LIST OF CASES CITED

U. S. SUPREME COURT

Coleman v. Tennessee, 97 U. S. 506.

In re Neagle, 135 U. S., 10 Sup. Ct. 658, 34 L. Ed. 55.

Tennessee v. Davis, 100 U. S. 257.

Osborn v. Bank, 9 Wheat. 865.

Kurtz v. Moffitt, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458.

U. S. v. Eliason, 16 Pet. 291, 10 L. Ed. 967.

In re Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636.

Ohio v. Thomas, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. Ed. 699.

In re Loney, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. Ed. 949.

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In re Lewis, (D.C.) 83 Fed. 159.

In re Waite, (D.C.) 81 Fed. 359, 31 C. C. A. 403, 88 Fed. 102.

Ex parte Bridges, 2 Woods 428, Fed. Case No. 1862.

OTHER CASES AND REFERENCES

Davis, Mil. Law 425.
Winthrop, Mil. Law 173.
Hutchins v. Van Bokkelen, 34 Me. 126.
Act Oct. 2, 1890, 26 Stat. 648.
Riggs v. State, 3 Cold. 85.
State v. Pike, 15 N. H. 83.
State v. Shelley, 11 Lea 594.
Ross v. State, 55 Ga. 192.
State v. Adams, 4 Blackf. 146.
People v. Kelly, 38 Cal. 145.
State v. Kirkpatrick, 32 Ark. 117.

UNITED STATES v. LIPSETT (Sheriff of Chippewa Co.) Ex Parte Gillette

District Court, W.D. Michigan, 1907. 156 Federal Reporter 65

Prepared by Captain Samuel G. Jones, 11th Cavalry

STATEMENT OF THE CASE

The facts are substantially these:

On or about July 22, 1907, Cyrus Gillette, a private of Co. M, 7th Infantry, stationed at Fort Brady, adjacent to Sault St. Marie, Mich., was posted as a sentinel over two military prisoners, who were engaged in work near the entrance to the military reservation. At least one of these prisoners, Hodson, was charged with desertion. While so employed the prisoner Hodson attempted to escape, in such attempt running easterly in a public street. Gillette immediately called upon the prisoner to halt, and repeated his call two or three times. Hodson ignored the call to halt, and continued his flight at full speed, Gilette following him as rapidly as he could (having a lame knee, and having been recently discharged from the hospital), loading his rifle as he went with the guard cartridge, in preference to the service cartridge, the former having a smaller charge of explosive and a differently shaped bullet from the latter, so as not to carry the projectile to such a great distance as the service cartridge does. Gillette held his fire some distance, while running, because of some children whom he saw in the street down which he was pursuing the escaping prisoner. When from 30 to 100 feet from the reservation limits Gillette fired

at Hodson, who was from 125 to 200 feet in advance of him, still running and trying to escape. The bullet passed over Hodson's head and accidently struck and killed Miss Elizabeth Cadenhead, who with friends, returning from a visit to Fort Brady, was walking along the street on which Gillette and Hodson were running and in the same direction, being at the time of the shooting from 375 to 475 feet ahead of Gillette, and thus from 250 to 275 feet ahead of Hodson. There is no claim that Gillette saw Miss Cadenhead, or any other member of her party, either before or at the time of the shooting; nor that he knew of their presence in the street. The point where Miss Cadenhead stood when the shot was fired was about five feet higher than the place occupied by Hodson.

After the firing Hodson continued his flight, turning from the street upon which he was running south about 100 feet, and then southeasterly about 130 feet, and hid in a clump of bushes and trees on a private residence lot, where he was found two hours later. After he turned south Gillette again fired at him but without effect. Gillette was familiar with the Manual of Guard Duty, United States Army, issued by authority of the Secretary of War, and which contained the following provision:

"If a prisoner attempts to escape, the sentinel will call halt. If he fails to halt after the sentinel has once repeated his call, aud there be no other possible means of preventing his escape, the sentinel will fire upon him."

This manual also contained a syllabus of the decision of the U. S. District Court for the Eastern District of Michigan in the case of U. S. vs. Clark, 31 Fed. 710, which contained, among other things, this statement:

"It seems that the sergeant of the guard has a

right to shoot a military convict if there be no other possible means of preventing his escape."

And said manual also contained the following extract from Circular No. 3, series 1883, Headquarters Department of the Columbia:

* * *

"A sentinel is placed as a guard over prisoners to prevent their escape, and, for this purpose, he is furnished a musket, with ammunition. To prevent escape is his first and most important duty."

* * *

"I suppose the law to be this: That a sentinel shall not use more force or violence to prevent the escape of the prisoner than is necessary to effect that object, but, if the prisoner, after being ordered to halt, continues his flight, the sentinel may maim or even kill him, and it is his duty to do so."

Immediately after the shooting Gillette was tried before a general court-martial convened at Fort Brady, Michigan, on a charge of manslaughter, in violation of the 62d Article of War, the specification being that he did "unlawfully, wilfully and feloniously kill Miss Elizabeth Cadenhead with a United States magazine rifle, loaded with powder and ball." He plead not guilty, and was acquitted, the findings and acquittal being approved by the reviewing authority in the following words:

"In the foregoing case of Private Cyrus Gillette, Company M, 7th Infantry, the evidence of record clearly shows that the accused, in compliance with his orders, pursued and shot an escaping prisoner. There is nothing to show that the accused had any cause to believe that the unfortunate accident that took place was liable to occur from his obeying the provisions of the guard manual, and as the shot was fired without either malice or recklessness on his part, in the evident belief that he was only discharging his duty to the United States government, the finding and acquittal are approved."

Gillette was accordingly restored to duty, but was subsequently arrested on a warrant issued by a state magistrate for Chippewa County, Michigan, charging him with manslaughter in killing Miss Cadenhead. Waiving examination he was held to trial before the Circuit Court of Chippewa County, and pending trial was committed to jail in default of bail. The United States through its District Attorney, acting under authority of the Attorney General, made application before the U. S. District Court for the Western District of Michigan, for a writ of habeas corpus, upon the ground that the state court was without jurisdiction to try Gillette for the offense charged.

The prisoner was produced in court, in obedience to the writ, and a hearing was had upon a stipulation of facts, no conflict of testimony being presented. No claim is made on the part of the state that Gillette had any malice or ill-will towards either Hodson or Miss Cadenhead, or that the homicide was other than accidental, nor is it asserted, nor any evidence adduced reasonably tending to show that Gillette, in firing the shot, acted otherwise than in good faith and in the supposed performance of his duty.

POINTS OF LAW TO BE DECIDED

The contention of the District Attorney was that the state was without jurisdiction, because:

(*a*) The act alleged to constitute the offense was done by Gillette in the performance of his duty under the laws and authority of the United States.

(*b*) The acquittal of Gillette by the court-martial is a bar to further prosecution in the state courts.

The defense of the writ, urged on behalf of the state, is that upon the record there exists a question of fact:

(*c*) Whether there was any other possible means

of preventing the escape of the fugitive, than by firing?

(*d*) Whether, under the circumstances, disclosed by the record—the street being unobstructed, and it thus having been possible to discover that Miss Cadenhead and her companion were in the line of fire—Gillette had exercised due care in firing?

(*e*) If it should be found that Gillette acted without the exercise of due care, his act became unlawful, and the homicide would be manslaughter, and the state has the right to have the questions of fact, referred to, tried by a jury in the state court.

DECISION OF THE COURT ON THESE POINTS

(*a*) As to the effect of former jeopardy, the court states in substance:

Whatever may have been the status of the authorities before the decision in the case of Grafton v. U. S.[1] that decision leaves open the question of the effect of a trial by a U. S. court-martial upon the right of trial in a state court, for the same act charged as constituting an offense of the same kind and nature. There have been two decisions in the district courts to the effect that such acquittal by court-martial is not a bar, viz. In re Clark[2], In re Fair[3], both of which cases were decided previously to the recent decision of the Supreme Court in Grafton v. U. S.

The court then dodges the issue:

"I do not find it necessary to pass upon the question of former jeopardy, because, in my judgment, this case can be disposed of on other grounds."

(*b*) The court then goes on to assert that the jurisdiction of the U. S. District Judge to act in this matter is undoubted. The Revised Statutes[4] give

[1] Grafton v. U. S., 206 U. S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084.

[2] In re Clark, (C.C.) 31 Fed. 710.

[3] In re Fair, (C.C.) 100 Fed. 149.

[4] Secs. 752, 753 Rev. Stat. U. S. Comp. St. 1901, p. 592.

to judges of the circuit and district courts authority to issue writs of habeas corpus to inquire into the cause of the restraint of liberty, when a prisoner is in custody for an act done in pursuance of a law of the United States.

And it follows that the judge may inquire whether the alleged act was done in the performance of a duty arising under a law of the United States. And the court further reasons that if the act done by Gillette was an act done in performance of duty as a soldier in the military service of the United States, it was of necessity done in pursuance of a law of the United States, and so was not within the jurisdiction of a state court to try.

The court refers to several decisions sustaining the enforcement of the statute, and his position:

In re Neagle:[1] A deputy marshal assigned to protect Justice Field against apprehended violence, killed a man alleged to be attempting a deadly assault upon the justice. Neagle was arrested by the California authorities and sued out a writ of habeas corpus on the ground that the killing of Justice Field's assailant was an act done in the discharge of his duty as an officer of the United States, and was therefore not murder; that he was held by the state authorities for an act done in pursuance of a law of the United States, and was entitled to his discharge. This was granted.

In re Waite (D. C.):[2] A United States pension examiner was arrested under a statute of the state of Iowa, charged with maliciously threatening to accuse a person of a crime in order to compel him to do an act against his will. The act alleged to constitute a crime was claimed by the prisoner to have been done while in the discharge of his duty as such an ex-

[1] In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55.

[2] In re Waite (D. C.), 81 Fed. 359, 88 Fed. C. C. A. 403.

aminer, in pursuance of a law of the United States, and relief was granted him on the ground that the state court had no jurisdiction to try him for an act committed in line of duty.

In re Lewis:[1] Special employes of the United States Treasury Department were arrested under the laws of Washington (state) for alleged robbery. The prisoner claimed the act was done in the discharge of his duty in the service of the United States. Relief was granted on the ground that the act was done in pursuance of the authority of the United States and the state courts were without jurisdiction to try.

In re Fair (C. C.):[2] A soldier in the military service of the United States, a guard over military prisoners at Fort Crook, Neb., was arrested by the state civil authorities on the charge of murder in the killing of a military prisoner while attempting to escape. Held that he was acting under authority of the United States, and the state authorities were therefore without jurisdiction to try him.

In each of the cases cited relief was granted on habeas corpus, and it was, of course, claimed in each that no crime in fact was committed, and that the act alleged to constitute a crime was in fact lawful.

The trend of judicial decisions on this subject, apparently unbroken, is well illustrated in the following quoted extract from the case of In re Waite (D. C.):[3]

"All these cases hold clearly, however, that when it is made to appear that an officer of the United States, or one acting under the authority of a law of the United States, is sought to be held in a state court for punishment under the provisions of a

[1] In re Lewis, 83 Fed. 159.
[2] In re Fair (C. C.), 100 Fed. 149.
[3] In re Waite (D. C.), 81 Fed. at p. 365.

statute, for an act done while in the performance of a duty he owed to the United States, the federal courts, either by removal, where the statute provides for that mode, or by writ of habeas corpus, must assume jurisdiction over the matter, and prevent further action in the state court, and the principle underlying the case is that the state has no jurisdiction over a person when he is acting under the authority of the United States."

The court then discusses the question that it might be urged that the prisoner having a remedy by way of review by the Supreme Court, in case of his conviction by a state court, should not be given the immediate relief by habeas corpus, and quotes from language used by the Circuit Court of Appeals in the case of In re Waite, as follows:[1]

"This contention, we think, is without merit. While it is true that the relief prayed for by the petitioner could have been obtained in the usual way, by a writ of error, yet, in our judgment, the case at bar does not belong to the class of cases in which a person in custody under the warrant of a state court should be compelled to seek relief by appeal or writ of error rather than by a writ of habeas corpus. * * * The arrest of federal officers or other persons for acts lawfully done in discharge of their duties under the federal laws impairs to a certain extent the authority and efficiency of the general government; and for that reason no court, so far as we are aware, has ever hesitated in that class of cases to discharge a petitioner from custody by writ of habeas corpus, when it appeared on a hearing of the case that the petitioner was entitled to be released from imprisonment."

The court then goes on to state that while the federal judge in such cases, in habeas corpus proceedings, will not hear evidence for the purpose of determining the guilt or innocence of the prisoner, yet it is his duty to examine the evidence to determine

[1] In re Waite, 88 Fed. at p. 107; 31 C. C. A. 403.

whether the act, alleged to be criminal, was done in the performance of duty in the service of the United States, and in this connection invites attention to the language used in the decision in the Lewis case:[1]

"It is true that this court could never adjudicate that question (respondent's guilt) finally, so as to convict and punish these men for robbery, if they were robbers; but in a proceeding of this kind it is absolutely necessary for the court to consider the question so far as to determine whether the officers acted wantonly, and with criminal intent, and whether insofar as their acts may be regarded as wrongful, they were mere errors of judgment. Take for instance the Neagle case, 135 U. S. 1, 10 Sup. Ct. 658. It is not to be conceived that, if Neagle had actually committed murder, the federal court would have shielded him from punishment. Suppose that Judge Terry had made no assault upon Judge Field, and there were no such appearances as to give reasonable grounds to a person in the situation that Neagle was in to suppose that it was necessary to use a deadly weapon in defense of Judge Field, and that while acting as a protector for Judge Field, in accordance with instructions from the Attorney General of the United States, he had wantonly shot and killed Judge Terry or some other man, so that his act would have been actual murder. Certainly Judge Sawyer and the Supreme Court of the United States would not have justified the use of the writ of habeas corpus to shield him from punishment."

The court then goes on to explain that while language of similar purport is found in several of the cases cited it does not mean that a soldier from the mere fact that he is in the service of the United States, is thereby rendered immune from punishment under the state laws. The distinction to be drawn is clearly expressed in In re Waite[1] where the Federal Court after holding that the state court was without

[1] In re Lewis, 83 Fed. at p. 160.

[1] In re Waite (D. C.) 81 Fed. at p. 363.

jurisdiction to try a federal officer for an act done in the discharge of his federal duty felt constrained to explain:

"By this it is not meant to assert that because a person is an officer or agent of the federal government he is thereby excepted from the jurisdiction of the state or the binding force of its laws. The mere fact that when the acts done by him were done he was an officer of the United States, charged with certain duties to that government, will not afford him immunity from prosecution under the laws of the state. Nor will the mere fact that he claims that the acts done were within the line of his official duty afford him protection, if the acts are such as to show that the claimed immunity is a mere subterfuge, and and that under no fair consideration of his official duty could he have assumed that he was acting in his official capacity when the acts complained of were done by him."

Express authority is conferred upon a federal judge in habeas corpus proceedings to pass upon questions of fact. Rev. Stat. §761.[1]

"The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the matter as law and justice require."

(*c*) As to the contention that a jury trial is necessary.

It is to be noted that in each of the cases above referred to, inquiry was entered into by the court or judge hearing the habeas corpus proceedings, and questions of fact were actually decided by the court or judge. A notably conspicuous case of this is that of In re Neagle[2] in which were tried out the disputed questions of fact as to whether the United States marshal was justified in killing the assailant

[1] Rev. Stat. §761, U. S. Comp. St. 1901., p. 594.

[2] In re Neagle, 135 U. S. 1.

of Judge Field. When the question was raised before it, on appeal, the Supreme Court said:

"To the objection made in the argument that the prisoner is discharged by this writ from the power of the state court to try him for the whole offense, the reply is that if the prisoner is held in the state court to answer for an act which he is authorized to do by a law of the United States, which it was his duty to do as marshal of the United States, and if in so doing that act, he did no more than was proper and necessary for him to do, he cannot be guilty of a crime under the laws of the state of California. * * * The Circuit Court of the United States was as competent to ascertain these facts as any other tribunal and it was not at all necessary that a jury should be impanelled to render a verdict on them."

The Supreme Court here decided that a jury trial was not necessary. In Drury v. Lewis it it unequivocally stated its opinion in favor of it, in cases of disputed fact, unless extraordinary and exceptional circumstances be shown. In this connection the Supreme Court said:

"It is an exceedingly delicate jurisdiction given to the Federal Courts by which a person under indictment in a state court and subject to its laws may by the decision of a single judge of the Federal Court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state and finally discharged therefrom, and thus the trial by the state courts of the indictment found under the laws of a state be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued. Such are the cases, In re Loney and In re Neagle, but the reason for the interference of the Federal Court in each of these cases were extraordinary, and presented what this court regarded as such exceptional facts as to justify the interference of the Federal tribunal."

In the case of Drury v. Lewis there was a conflict of evidence as to whether the act complained of was wanton. If wanton, the act could not have been

committed in performance of any duty imposed by federal law, and the United States Circuit Court declined to determine that fact and give relief to the petitioners.

The Supreme Court upheld this decision, saying in substance that the guilt or innocence of the accused rested on the determination of that single fact, and as the act was done within the jurisdiction of the state, it was for the state court and not the United States Circuit Court to hear and determine evidence on that question of fact.

From which we see, that where there is a conflict of evidence, a question of disputed fact, as to whether the act was wanton, and therefore criminal, and the act was done within the jurisdiction of the state, the federal courts will, in general, decline to determine the question of fact, but leave it to be passed upon by the state court, refusing immediate relief to the petitioners through writ of habeas corpus, and leaving ultimate remedy to be sought on writ of error on appeal, after trial has been had in the state court.

However the case under consideration in this summary is not in conflict with the case of Drury vs. Lewis[1] for in the case herein presented there is no conflict of testimony as to whether the act complained of was wanton.

(*d*) As to the question, whether the prisoner (Gillette), in firing the shot, was in fact acting in the supposed performance of his duty.

The court then goes on to say:

"The order and rulings contained in the Guard Manual were properly relied upon by the guard, because such orders and rulings, were not in fact illegal, but, on the contrary, were legal. If, therefore the guard, in shooting as he did, was acting in the

[1]Drury vs. Lewis, on Appeal from U. S. Circuit Court for West Dist. Penn., 220 U. S. 1.

supposed exercise of his duty, without malice or criminal intent—and as already said, there is no claim of such—he is not liable to prosecution in the state court from the fact that from misinformation or lack of good judgment he transcended his authority, even though he might be liable to a civil action at the suit of the injured party. This proposition is sustained by the decisions in the cases of Fair, Lewis, and Waite, above cited."

The court says further:

"It is well settled that if a homicide be committed by a military guard without malice, and in the performance of his supposed duty as a soldier, such homicide is excusable, unless the order or authority relied upon was such that a man of ordinary sense and understanding would know that it was illegal. This proposition is affirmed in In re Clark, supra, and in In re Fair, supra. As pointed out in In re Clark, it is the duty of the guard pursuing a deserter to call 'Halt!' and to repeat the call, and if there is no other reasonable means to prevent escape to shoot. A guard failing to do so would be guilty of a most serious military offense, and liable to severe punishment therefor. The manual of guard[1] duty, with which the prisoner was familiar contained an express ruling of the military authorities that if a prisoner, after being ordered to halt, continues his flight, it is the duty of the guard to shoot, even maiming or killing."

The court then explains, that by reference to this ruling, it was not intended to hold that it was the duty of the guard to shoot in any event, but that the guard should exercise his discretion as to whether it was necessary to do so to prevent escape.

The court continues;

(*e*) "Does it satisfactorily appear that it seemed to the respondent reasonably necessary to shoot at the prisoner so attempting to escape?

"It is my duty sitting as judge in this proceeding to determine this fact. If a reasonable question

[1]Manual of Guard Duty, U. S. Army, 1902, p. 68 et. seq.

existed, under a conflict of testimony, whether the guard was acting wantonly, rather than in the supposed performance of his duty, or otherwise stated, whether it was believed by him, *at the time* to be reasonably necessary to shoot, I should perhaps exercise the discretion which rests in me, in favor of submitting the question to a jury in the State court; but there is no conflict of testimony, and the suggestion that different minds might draw different inferences from undisputed facts furnishes no reason why I should abdicate my responsibility to decide in this proceeding, whether the guard in shooting at the fleeing deserter, acted in the supposed discharge of his duty. That he did so act is clear. There is no room for reasonable inference to the contrary. It is conceded that he acted without malice or ill will. His good faith is not impugned.

* * * That it seemed to the guard *reasonably necessary* to shoot is clear. The guard was lame and lately discharged from the hospital; the deserter was apparently gaining on him, disregarding the order to halt, determined to escape, and continuing to flee even after the shot in question and still another was fired, and actually evading discovery for two hours longer."

(*f*) "That he was not criminally reckless, is shown:

"By his holding hisfire, until those seen by him in the line of fire were out of the way. The fact that in the excitement of pursuit, with his attention upon the fugitive, then on lower ground, he failed to see the pedestrians 400 feet ahead, and on higher ground, does not, under the *agreed* facts, show recklessness.

* * * Even though it might have been *more prudent* for the guard to have exercised still *greater care* in the prevention of this deplorable accident, such facts would not convert this accident into a crime, for he was not engaged in an unlawful act. A homicide by such misadventure, under such circumstances, is not criminal. U. S. v. Meagher.[1] The case presented to my mind is such that if I were sitting with a jury on a trial of the case I should

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[1] U. S. v. Meagher, (C.C.) 37 Fed. 875.

deem it my duty to instruct the jury to acquit the respondent."

(*g*) That the United States may protect itself by bringing this proceeding through its judicial department, is established by authority.

"It is only necessary to cite the matter of Fair, before referred to. Indeed, in view of the breadth of the statute, it should scarcely be necessary to cite authorities upon that proposition.

"* * * The State authorities have acted prudently in bringing the matter to the attention of the civil tribunals, and thus affording this opportunity for a judicial determination of the prisoner's liability to prosecution."

SUMMING UP AND ORDER OF COURT

"Finding as I do, upon this question of fact, that in firing the shot in question, the prisoner was acting in the discharge of his duty as a soldier in the military service of the United States, and accordingly the State authorities have no jurisdiction to try him for the homicide in question, it becomes my duty to order his release.

"It is accordingly ordered that he be released from confinement, and that he be restored to the military service of the United States, according to the terms of his enlistment."

LIST OF CASES CITED

In Re Neagle, 10 Sup. Ct. 658, 672, and 135 U. S. 1, and at p. 75; Grafton v. U. S., 27 Sup. Ct. 748, 206 U. S. 333.

In Re Waite, 88 Fed. 102.

In Re Loney, 134 U. S. 372.

Drury v. Lewis, 200 U. S. 1.

In Re Clark, (C.C.) 31 Fed. 710.

In Re Fair, (C.C.) 100 Fed. 149.

U. S. v. Meagher, (C.C.) 37 Fed. 875.

In Re Waite, (D.C.) 81 Fed. 359, at pp. 107 and 363; 31 C. C. A. 403.

In Re Lewis, (D.C.) 83 Fed. 159, 160.

In Re Neagle, 34 L. Ed. 55.
Grafton v. U. S., 51 L. Ed. 1084.

Secs. 752, 753 and 761 Rev. Stat. (U.S. Comp. Stat. 1901, pp. 592, 594).
Manual of Guard Duty, U.S. Army, 1902, Ed., pp. 68 et seq.

UNITED STATES, ex rel. DRURY et al. v. LEWIS, JAIL WARDEN

Circuit Court, W. D. Pennsylvania, 1909
129 Federal Reporter 823

Supreme Court of the United States, 1906
200 U. S. 1.

Prepared by Captain Alfred W. Bjornstad, 28th Infantry.

DRURY V. LEWIS

STATEMENT OF THE CASE

Allegheny Arsenal, in the city of Pittsburg, Pa., is government land over which the United States exercise general and exclusive criminal jurisdiction.

In September, 1903, the arsenal was administered as a sub-post of Fort Niagara, N. Y., and was garrisoned by 2d Lieutenant R. W. Drury, 9th Infanty, commanding, and twenty enlisted men, one of whom was John Dowd. Drury's duty in connection with government property was prescribed by paragraphs 739, 740, 764 and 766 of the Army Regulations of 1901. These requirements were not inconsistent with any laws of a superior law-making authority.

Prior to September 10, 1903, a series of minor depredations had been committed in and about the arsenal buildings by unkown persons. Copper spouts and eaves had been torn from the buildings and stolen. The duty and authority of the commander included the summary arrest of persons perpetrating these

depredations. The present regulation on the subject is in paragraph 694 (A.R. 1908) and reads, "Persons caught in the act of stealing public property shall be summarily arrested by the troops and turned over to civil authorities for trial". In September, 1903, this regulation was included in paragraph 771, A. R., 1901. (See also, Sec. 161, Rev. Stat. and Campbell vs. Thayer, 88 Fed. 102).

Drury's immediate superior, the commanding officer at Fort Niagara, had directed Drury to make every effort to stop the depredations, to establish patrols, and to apprehend and arrest all offenders.

On the morning of September 10, 1903, Drury was informed that some persons were again stealing copper from one of the arsenal buildings. He hurried at once with two privates of the guard, one of whom was Dowd, beyond the arsenal grounds by the streets of the City of Pittsburg to the vicinity of the building from which the copper was supposedly being taken. The routes pursued, one by Drury and a different one by the detail of the guard, were selected with a view to intercepting the depredators. Before leaving the two privates Drury instructed them to arrest any person coming from the arsenal. Drury, proceeding down a street which runs along, but outside, of the arsenal wall, came upon three or four young men who fled in different directions on his approach. One of the men, named Crowley, was then seen by Dowd running away from the arsenal. When Crowley was about 100 yards from the arsenal wall he was shot by Dowd and died the same day. At the time of the shooting Crowley, Dowd and Drury were beyond the limits of the arsenal and within the territorial jurisdiction of the State of Pennsylvania.

It was ascertained afterwards that Crowley was in fact a member of a party engaged in stealing copper, as suspected by Drury and Dowd. Hence there

was ample authority for the arrest of Crowley by Drury or his subordinates. And Crowley being thus a fleeing felon, force could be used sufficient to prevent his escape, but no more than seemed reasonably necessary in the circumstances. From this point there was a dispute as to facts. On the one hand evidence was produced tending to prove that Dowd cried "halt" several times and that he fired only when it was clear that Crowley did not intend to halt. On the other hand evidence was produced tending to show that Crowley did halt, and that he shouted "I give up", or words to that effect, but that at this juncture Drury commanded "fire", whereupon Dowd fired.

Drury and Dowd were indicted by the grand jury of Allegheny County, Pa., and arrested by the State authorities under the charge of murder, as to Drury, and manslaughter, as to Dowd.

Before trial, Drury and Dowd attempted to effect their discharge from the State jurisdiction by habeas corpus proceedings instituted in the federal Circuit Court for the Western District of Pennsylvania, but the decision of this court was adverse to the petitioners. 129 Fed. 823.

An appeal was taken to the Supreme Court of the United States. Here, also, the decision of the court was adverse to the petitioners. 200 U. S. 1. And Drury and Dowd were remanded to the custody of the State for trial under the indictment.

NOTE.—At the trial new witnesses were produced testifying in corroboration of Dowd who insisted that Crowley had evinced no disposition to halt, and had, in fact, gained such advantageous ground that it seemed likely he would soon disappear from Dowd's view. Drury and Dowd were accordingly acquitted, having acted properly within the scope of their duty.

QUESTIONS OF LAW

In the habeas corpus proceeding in the Circuit Court, as well as on appeal to the Supreme Court, the following questions of law came up for decision:

1. What is the duty of a federal court, under the acts of Congress, in habeas corpus cases where, in advance of trial by the state, an effort is being made to defeat the jurisdiction of the state?

2. To what extent may federal courts inquire into the facts in order to determine the issue in habeas corpus proceedings?

3. Where an act is done supposedly in the proper discharge of a federal duty, or within the scope of federal authority, under what circumstances will federal courts permit the exercise of state jurisdiction and under what circumstances will they refuse jurisdiction to the state by ordering the discharge of the accused? In other words, to what extent are federal officers or agents amenable to state criminal jurisdiction for acts done in the discharge of their duty?

DECISION

1. As to the first question:

The U. S. Circuit Court has, under the federal Constitution and statutes, the power to inquire into the reason or authority for the restraint of a person by the state jurisdiction, prior to trial under the same, where the petitioner contends that the acts constituting the supposed offense against the state were done in pursuance of a law of the United States, or where the petitioner is restrained in violation of the Constitution, treaties or laws of the United States. In re Neagle, 135 U. S. 1; In re Waite, 81 Fed. 359; Ohio vs. Thomas, 173 U. S. 276; Sec. 761 Rev. Stat.

While the Circuit Court has this jurisdiction and

will issue the writ of habeas corpus under the conditions mentioned, it will not exercise the jurisdiction to the extent of ordering the discharge of the petitioner, and thus delay the state jurisdiction, except it be in a case of peculiar urgency. The normal procedure will be to leave the petitioner to be dealt with by the courts of the state, and, after the trial, review the case, possibly on petition for a writ of habeas corpus, but preferably on a writ of error. Ex parte Royall, 117 U. S. 241; Whitten vs. Tomlinson, 160 U. S. 231; Baker vs. Grice, 169 U. S. 284.

The federal courts have the power to take an accused out of the jurisdiction of the state by ordering his discharge, but it is a power to be exercised carefully and conservatively. Exceptional cases have occurred where the state has been wholly without jurisdiction and the accused has been ordered discharged prior to trial. In re Loney, 134 U. S. 372; In re Neagle, 135 U. S. 1; In re Waite, 81 Fed. 359.

The general rule that the courts of the state should be permitted to determine the guilt or innocence of the accused is necessary to insure a competent determination of this issue. For, if the jurisdiction of the state is defeated, there is no court remaining competent to try the case. No federal court would have jurisdiction. Crowley was a citizen of Pennsylvania, not in the military service of the United States, and was killed within the city of Pittsburg—not on land over which the United States had general criminal jurisdiction.

2. As to the second question:

In a hearing upon a writ of habeas corpus, the federal court is necessarily compelled to investigate the facts in connection with the alleged offense. This is so because the question before the court is as to the jurisdiction of the state, and it is necessary to ascertain whether the facts show probable cause to

believe that an offense has been committed, triable by the state court, or whether the facts show conduct which entitles the petitioner to the intervention and protection of the federal authority. The determination of the facts is not for the purpose of deciding the question of guilt or innocence.

In the case of Drury and Dowd this can be done legally only by a jury in a state court of Pennsylvania. But if the facts clearly show that Drury and Dowd were in the proper execution of a federal duty and within their authority, there is no longer probable cause to believe that an offense has been committed against the peace and dignity of Pennsylvania, and, under such circumstances, federal courts can properly protect federal agents by ordering their discharge from state custody. Cases in which the facts were not in dispute and in which the federal agent was ordered discharged from the custody of the state on the ground that the acts, though done within the territorial jurisdiction of a state, were clearly done within the scope of federal authority or duty, are In re Fair, 100 Fed. 149; In re Neagle, 135 U. S. 1; In re Waite, 81 Fed. 359; In re Lewis, 83 Fed. 159; U. S. vs. Fuellhart, 106 Fed. 911; In re Turner, 119 Fed. 231; and Ohio vs. Thomas, 173 U. S. 276.

Both the federal Circuit Court and Supreme Court found, however, that there was a dispute as to the facts; that the state contended that there was no necessity for using force, since Crowley had abandoned his flight and had offered to surrender. The question whether Crowley was a fleeing felon was open to dispute on the evidence. This question was the gist of the case and was for the state to pass upon. The assertion that Crowley was resisting arrest and in flight when shot became, then, a matter of defense, and a matter which federal courts are not competent to decide. Ex parte Crouch, 112 U. S. 178.

Comparing Drury's case with that of Neagle (In re Neagle, 135 U. S. 1), we find that in the latter there was no dispute as to the facts and the federal court exercised its undoubted power to take petitioners from the custody of state officers in advance of trial in the state courts. It is therefore a discretionary power in the Circuit Court.

3. As to the third question:

Crowley had been guilty of the crime of larceny committed on the Allegheny Arsenal property. He could have been indicted and prosecuted in the District Court of the United States under Section 5439 or Section 5391, Revised Statutes, or under the local law. It was the duty of Drury and Dowd to arrest Crowley and deliver him into the custody of the state authorities for prosecution. In the discharge of this duty they had ample authority to pursue Crowley into the territory of Pennsylvania, since, as to the making of arrests the jurisdiction of the United States is coextensive with its boundaries. And they had authority to exercise whatever force was necessary to stop the fleeing felon, even to the killing of the fugitive if he persisted in his flight and it was reasonably believed that he could not be captured otherwise than by wounding or killing.

When federal officers or agents are in the proper exercise of such authority the state cannot assume to judge their acts and it is proper for the federal courts to order the discharge of any such federal officer or agent from the custody of the state. But where a federal officer or agent exceeds his authority he is on a plane with the ordinary citizen and is amenable to state jurisdiction if his acts constitute an offense cognizable by that jurisdiction. This amenability extends to persons in the military service of the United States and the 59th Article of War is a distinct recognition of this fact by Congress.

Such criminal jurisdiction has always been exercised by the state. Coleman vs. Tennessee, 97 U. S. 509.

It is not always possible to determine, in advance of the establishment of the facts by a jury, whether the authority was, in fact, exceeded. If there be probable cause to believe that the authority was exceeded and that as a result thereof an offense has been committed against the laws of the state, the federal courts will remand the petitioner to the state authorities for trial. The case may still be reviewed by the federal courts after trial and in the light of the evidence produced at the trial.

As has been stated, there was a dispute as to the necessity for the employment of the force actually used by Drury and Dowd. There was evidence tending to show that Crowley was shot after halting and offering to surrender. Therefore there was probable cause to believe that an offense, cognizable by the state of Pennsylvania, had been committed.

The order of the United States District Court discharging the writ of habeas corpus and remanding Drury and Dowd to the custody of the authorities of Allegheny County was affirmed by the United States Court.

Secs. 161, 753, 761, 5391, 5439, Rev. Stat.
59th Article of War.
Coleman vs. Tennessee, 97 U. S. 509.
Ex parte Crouch, 112 U. S. 178.
Ex parte Royall, 117 U. S. 241.
In re Loney, 134 U. S. 372.
In re Neagle, 135 U. S. 1.
Whitten vs. Tomlinson, 160 U. S. 231.
Baker vs. Grice, 169 U. S. 284.
Ohio vs. Thomas, 183 U. S. 276.
In re Waite, 81 Fed. 359.
In re Lewis, 83 Fed. 159.
Campbell vs. Thayer, 88 Fed. 102.

In re Fair, 100 Fed. 149.
U. S. vs. Fuellhart, 106 Fed. 911.
In re Turner, 119 Fed. 221.
Sec. 694, A. R. 1908.
Secs. 739, 740, 764, 666, 771, A. R. 1901.

GRAFTON vs. UNITED STATES

Supreme Court of the United States, 1907
206 U. S. 333

Prepared by Captain Paul B. Malone, 27th Infantry

STATEMENT OF THE CASE

Private Homer E. Grafton, Company G, 12th Infantry, a regularly detailed member of the guard, was duly posted as a sentinel for duty from 2 p.m. to 4 p.m., July 24, 1904, at Buena Vista Landing, Guimaras, P. I., his duty requiring him to guard certain stores and other property of the United States. According to his testimony, given before the general court-martial which subsequently tried him, Grafton, while on post, noticed what appeared to be suspicious movements on the part of natives adjacent to his post and reported his observations to the corporal of the guard. Shortly after making his report Grafton saw two natives approaching along his post. As they approached, according to testimony, one of them drew a knife or a bolo from his breast and concealed it behind his forearm. When within twenty-five or thirty feet from him the natives rushed upon Grafton. The latter thereupon fired two shots from the magazine of his rifle, the successive shots separated from each other by an interval of about five seconds. Both shots took effect. The first killed Florentino Castro, who fell about four or five paces from Grafton, the knife carried by Castro falling about midway between them. The second shot killed Felix Villanuevo as the latter attempted to escape.

The case was immediately investigated by the military authorities and charges were preferred against Grafton for manslaughter in violation of the 62d Article of War.

Charge:—Violation of the 62 Article of War.

Specification 1:—In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, wilfully and feloniously kill Florentino Castro, a Filipino, by shooting him with a United States magazine rifle, caliber .30.

This at Buena Vista Landing, Guimaras, P. I., July 24, 1904.

Specification 2:—In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, wilfully and feloniously kill Felix Villanueva, a Filipino, by shooting him with a United States magazine rifle, caliber .30.

This at Buena Vista Landing, Guimaras, P. I., July 24, 1904.

It was shown in the testimony that General Carter, commanding the department, ordered no trial by court-martial until the case had been offered for trial to the Court of First Instance, but the latter court failed to assume jurisdiction over the case. Grafton was therefore regularly tried by general court-martial under the foregoing charge and specifications August 16, 1904, was acquitted the same day, and the proceedings, finding and acquittal were approved by the reviewing authority August 25, 1904, and Grafton was released from confinement and restored to duty.

Subsequently, the civil authorities at Iloilo, being dissatisfied with the result of the trial, charged Grafton with assassination in killing Felix Villanueva, the second native shot, and demanded that he should be delivered by the military authorities for trial.

Grafton appeared before the Court of First In-

stance in obedience to this demand, demurred to the indictment and denied the jurisdiction of the court upon the grounds, among many others—

(*a*) Because the act constituting the offense was done by a soldier of the United States in performance of his duty under the laws of the United States.

(*b*) Because he was entitled to his constitutional privilege of trial by jury.

(*c*) Because he could not legally be brought to trial by any court, other than a military tribunal, except on an indictment found and presented by a grand jury.

The demurrer and indictment were overruled.

Grafton then pleaded specially in bar of trial the record of his previous trial and acquittal of the same offense by a general court-martial, which plea was likewise overruled.

He then pleaded not guilty. The court thereupon, proceeded to the trial, convicted him of homicide, and sentenced him to "imprisonment in such prison as the law directs for the term of twelve years and one day, and to pay the cost of the prosecution and to suffer all the other accessories of said sentence."

From the finding and sentence of the Court of First Instance Grafton appealed to the Supreme Court of the Philippines assigning error on the part of the Court of the First Instance in overruling his demurrer and plea in bar of trial and in the finding of guilty on the merits of the case.

This appeal was argued in the Supreme Court of the Philippines 10 August, 1905, re-argued 25 January, 1906, and a decision affirming the sentence of the lower court was rendered by a divided court on April 13, 1906, three Filipino judges and one American judge deciding against Grafton and three American judges for him.

The decision of the Supreme Court of the Philippines with citations on which the decision is based may be summarized as follows:

1. The acquittal by court-martial was no bar to the civil prosecution.

Ex parte Mason, 105 U. S. 696, 699.

Steiner's Case, 6 Op. 413, in which it was held by the Attorney General that Steiner's trial by the courts of Texas for killing an officer was no bar to his subsequent trial by general court- martial for the same offense. The case of Captain Howe, 6 Op. 506, in which it was held that trial for manslaughter in the Supreme Court of Florida was not a bar to trial by a general court-martial for cruel conduct predicated upon the same facts.

Citing:—

Moore vs. the people of the state of Illinois, 14 How. 20.
Fox vs. State of Ohio, 5 How. 434.
United States vs. Marigold, 9 How. 569.
Negro Ann Hammond vs. the State, 14 Md. 135.
The Case of Lieut. Maney, 61 Fed. Rep. 140.
Wilkes vs. Dinsman, 7 How. 89.
United States vs. Clark, 31 Fed. Rep. 710.
Coleman vs. Tennessee, 96 U. S. 509.
United States vs. Cashiel, Fed. Cs. 14744.
Digest Opinions J. A. Gen. pages 92, 38, 48.

The Court of First Instance had jurisdiction. * * * * * There is no doubt of the plenary power of Congress anywhere in a territory.

United States vs. Cornell, 2 Mason 60.
People vs. Godfrey, 17 Johns. 225.
Commonwealth vs. Young, Brightly Pa. 302, 7 Op. 571.
Fort Leavenworth R. R. Co. vs. Lowe, 114 U. S. 525.

U. S. vs. Stahl, 1 Woolw. 192.
U. S. vs. McBratney, 104 U. S. 621.
Ex parte Crow Dog, 109 U. S. 556.
U. S. vs. Kagama, 118 U. S. 375.
In re Wilson, 140 U. S. 575.
Murphey vs. Ramsey, 124 U. S. 15.
Mormon Church vs. U. S., 136 U. S. 1.
R. S. secs. 1851, 1868, 1895, 1910, 1925, 5339, 7 Op. 561.
Kepner vs. U. S., 195 U. S. 114-119, etc.

3. Grafton was not entitled to be indicted by a grand jury or tried by a petit jury.

Hurtado vs. California, 110 U. S. 516.
Maxwell vs. Dow, 176 U. S. 581, 604.
Hawaii vs. Mankichi, 190 U. S. 197.
Dorr vs. U. S. 195 U. S. 138, 149, in which it was held that the "Constitution does not without legislation and of its own force carry such right (right of trial by jury) to territory so situated" (referring especially to the Philippine Islands.
In re Ross, 140 U. S. 453. See Secs. 4083, 4084, R. S.
Cook vs. U. S., 138 U. S. 157, 181.

4. Grafton was not in the performance of his military duty and is not justifiable.

"This was not the case of an escaping felon. * *
Drury vs. Lewis, 200 U. S. 1, 8, etc.
"The law of self defense does not justify one in following up his adversary after the immediate danger has ceased and then killing him. Such a law would make every man his own avenger.
Oregon vs. Conally, 3 Oreg. 69-72.
Beard vs. U. S., 158 U. S. 550.
Allen vs. U. S., 150 U. S. 551.
Rowe vs. U. S., 164 U. S. 546, 557.
Allen vs. U. S., 150 U. S. 551, 561.

"The act was deliberate here, because Grafton

knew or ought to have known under the circumstances that he need not shoot again. If he had time to load, he had sufficient time to pause and reflect. The dissenting opinion concedes that this is clear now. Practically as well as legally, it was just as clear to a trained soldier held to a high degree of self control and responsibility as well as alertness. Indeed, he was bound to a higher degree of care than an ordinarily reasonable and prudent man, and this killing, by any one, was unnecessary if not wanton."

The above opinion was delivered by Mr. Henry M. Hoyt, Solicitor General.

Grafton appealed from the opinion of the Supreme Court of the Philippines to the Supreme Court of the United States on the following assignments of error:

1. The court erred in holding that the plaintiff in error had not been twice put in jeopardy of punishment for the same offense.

2. The court erred in holding that the plaintiff in error, though an enlisted man of the Army of the United States and being at the time of the alleged offense in the Philippine Islands by virtue of military orders, could be tried by the civil courts of the Philippine Islands without a jury, notwithstanding the guarantees provided by Section 2, Article 3 of the Constitution of the United States of America, and Articles 5 and 6 of the Amendments thereto.

3. The court erred in holding that the civil courts of the Philippine Islands have jurisdiction to try a soldier of the United States for an act done in the performance of a military duty imposed under the Constitution and laws of the United States.

4. The court erred in holding that the act of the plaintiff in error, committed without malice and in the honest and reasonable belief that he was performing his duty, constituted an infraction of Article 404 of the Penal Code of the Philippine Islands, and the crime of homicide.

The principal argument of counsel for Grafton was as follows:

That the condition of double jeopardy rests on both the Federal Constitution and the Philippine Penal Act; that no person can be twice placed in jeopardy for the same offense by *courts of the same sovereignty*; that the trial, therefore, by general court-martial for manslaughter in killing Felix Villanueva bars trial by the Court of First Instance of the Philippine Islands for murder or assassination in killing the same individual.

In support of the first assignment of error counsel for Grafton quoted the following authorities:

Ex parte Lange, 18 Wallace 205.
5th Amendment to the Constitution.
Sec. 5, Act of Congress, July 1, 1902, extending the principle of the 5th Amendment to the Philippine Islands.
Bishop on Criminal Law, Vol. 1, Sec. 979.
Kepner vs. U. S., 195 U. S. 100.
The Abbotsford, 92 U. S. 440.
U. S. vs. Gilbert, 2d Sumner 39.
Coleman vs. Tennessee, 97 U. S. 509.
People vs. Minor, 144 Ill. 308.
State vs. Bowen, 45 Minn. 145.
State vs. Lange, 96 Tenn. 668.
U. S. vs. Colley, No. 1303, Supreme Court of the Philippines.
Commonwealth vs. Roby, 12 Pick. (Mass.) 496.
Wilkes vs. Dinsman, 7 How. 123.
Fox vs. Ohio, 5 How. 410.
Baron vs. Mayor, 7 Peters 243.
Moore vs. People of Ill., 14 How. 13.
U. S. vs. Cashiel, 25 Fed. Cases 318.
Sec. 8, Article 1, Constitution United States.
Sec. 1342, R. S.
Ex parte Milligan, 71 U. S. 123.
Ex parte Davison, 21 Fed. Rep. 620.
Ex parte Reed, 100 U. S. 13.
In re McVey, 23 Fed. Rep. 878.
Carter vs. Roberts, 177 U. S. 496.
Carter vs. McClaughry, 183 U. S. 365, etc.

In support of the 2d assignment of error, counsel for Grafton quoted the following authorities:

Article 3, Sec. 2 of the Constitution.
Article 5 and 6 of the Amendments to the Constitution.
Article 1, Sec. 8, and Article 4, Sec. 3, of the Constitution.
Sec. 1342, R. S., and argued that the case of Dorr vs. U. S., 195 U. S. 138, did not apply to a soldier of the United States ordered to the Philippine Islands without his consent.
Downes vs. Bidwell, 182 U. S. 244.

In support of the 3d assignment of error, counsel for Grafton quoted the following authorities:

In re Fair, 100 Fed. Rep. 155.
Lewis's Case, 83 Fed. Rep. 159.
Tenn. vs. Davis, 100 U. S. 257.
In re Neagle, 135 U. S. 1.
In re Grimley, 137 U. S. 147.
U. S. vs. Clark, 31 Fed. Rep. 710.
In re Waite, 81 Fed. Rep. 359.
Reynolds vs. U. S., 98 U. S. 145
Good vs. Martin, 95 U. S. 90.
Canter's Case, 2 Pet. 552.
McAllister vs. U. S., 141 U. S. 174.
Act of Congress, July 1, 1902.

In support of the 4th assignment of error, counsel for Grafton quoted the following authorities:

De La Rama vs. De La Rama, 301 U. S. 203.
Justice Harlan in Beard vs. U. S., 158 U. S. 564.
Martin vs. State, 90 Ala. 602.
State vs. Patterson, 45 Vt. 308.
Karr vs. State, 46 Am. State Reports, 17 Ala.
Allen vs. U. S., 150 U. S. 560.
N. O. & N. E. R. R. Co. vs. Jones, 142 U.S. 23.

The points of law to be decided were then as follows:

1. Had Grafton been twice placed in jeopardy of punishment for the same offense?

2. Had he, a soldier of the United States Army, a right to trial by jury while serving in the Philippines if tried by a civil court?

3. Was Grafton in the performance of a federal duty, and if so, had the courts of the Philippine Islands jurisdiction in the case?

4. Assuming that the courts of the Philippine Islands had jurisdiction to try the accused, did the act of the accused constitute an infraction of Article 404 of the Penal Code of the Philippine Islands?

OPINION OF THE COURT

The case was argued before the Supreme Court of the United States in the October term of 1906, and Mr. Justice Harlan delivered the opinion of the court May 27, 1907.

After narrating the history of the case, the court says:

"The principal contention of the accused is that his acquittal by the court-martial forbade his being again tried in the civil court for the same offense. He bases his contention in part upon that clause of the 5th Amendment of the Constitution, providing, 'Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb'; and, in part, upon the Act of Congress of July 1, 1902, providing temporarily for the administration of the affairs of civil government in the Philippine Islands, and which act declared that no person for the same offense shall twice be put in jeopardy of punishment.[1] That the prohibition of double jeopardy is applicable to all criminal prosecutions in the Philippines was settled upon full consideration in the recent case of Kepner vs. United States, 195 U. S. 100, 124,

[1] 32 Stat. 691.

126, 129, 130, in which it was held that by force of the above act of Congress such prohibition was carried to the Philippines and became the law of those islands."

The principle of double jeopardy applying to the Philippines, and therefore to Grafton's case, it became necessary to inquire whether Grafton had once been placed in jeopardy of punishment by his trial by general court martial. Upon this point the court speaks as follows:

"We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged. It is alike indisputable that if a court martial has jurisdiction to try an officer or soldier for a crime, its judgment will be accorded the finality and conclusiveness as to the issues involved which attend the judgments of a civil court in a case of which it may legally take cognizance."[2]

* * * * * "It thus appears to be settled that the civil tribunals cannot disregard the judgments of a general court-martial against an accused officer or soldier if such court had jurisdiction to try the offense set forth in the charge and specifications; this, notwithstanding the civil court, if it had first taken hold of the case, might have tried the accused for the same offense or even one of higher grade arising out of the same facts.

"We are now to inquire whether the court-martial in the Philippines had jurisdiction to try Grafton for the offense charged against him. It is unnecessary to enter upon an extended discussion of that question; for it is entirely clear that the court-martial had jurisdiction to try the accused upon the charges preferred against him. The 62d Article of War, in express words, confers upon a general, or a

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[2] Ex parte Reed, 100 U. S. 13, 23.
Ex parte Mason, 105 U.S. 696, 699.
Carter vs. Roberts, 177 U. S. 496, 498.
Carter vs. McClaughry, 183 U. S. 365, 380.

regimental, garrison, or field officer's court-martial, according to the nature and degree of the offense, jurisdiction to try 'all crimes' not capital, committed in time of peace by an officer or soldier of the army. The crimes referred to in that article manifestly embrace those not capital, committed by officers or soldiers of the Army in violation of public law as enforced by the civil power. No crimes committed by officers or soldiers of the army are excepted by the above article from the jurisdiction thus conferred upon courts-martial, except those that are capital in their nature. While, however, the jurisdiction of general courts-martial extends to all crimes, not capital, committed against public law by an officer or soldier of the army within the limits of the territory in which he is serving, this jurisdiction is not exclusive, but only concurrent with that of the civil courts. Of such offenses courts-martial may take cognizance under the 62d Article of War, and, if they first acquire jurisdiction, their judgments cannot be disregarded by the civil courts for mere error or for any reason not affecting the jurisdiction of the military court."

From the above it is clear that the trial of Grafton by the general court-martial placed him in jeopardy of punishment within the meaning of the 5th Amendment to the Constitution and of the Act of Congress of July 1, 1902, extending the principle of double jeopardy to the Philippine Islands. Under these circumstances, did his subsequent trial by the Court of First Instance place him in jeopardy of punishment a second time for the same offense?

Upon this point the court continued as follows:

"We are next to inquire whether having been acquitted by a court-martial of the crime of homicide as defined by the Penal Code of the Philippines, could Grafton be subjected thereafter to trial for the same offense in a civil tribunal deriving its authority, as did the court-martial, from the same government, namely, that of the United States?

"That he will be punished for the identical offense of which he has been acquitted, if the judgment of

the civil court now before us, be affirmed, is beyond question, because as appears from the record, the civil court found him guilty and sentenced him to imprisonment specifically for 'an infraction of Article 404 of said Penal Code and of the crime of homicide.'

"It was said by the trial judge that the offense charged against Grafton in the civil court was 'assassination' which offense, he said, was punishable under section 403 of the Philippines Penal Code by death, and of which crime the military court could not, under the Articles of War, have taken cognizance; whereas, the offense for which he was tried by the court-martial was only homicide as defined by section 404 of the Penal Code. But if not guilty of homicide as defined in the latter section of the Penal Code—and such was the finding of the court-martial—he could not for the same acts and under the same evidence, be guilty of assassination as defined in the former section of the Code. Looking at the matter in another way, the above suggestion by the trial judge could only mean that simply because, speaking generally, the civil court has jurisdiction to try an officer or soldier of the Army for the crime of assassination, it may yet render a judgment by which he could be subjected to punishment for an offense included in the offense of assassination, although of such lesser offense he had been previously acquitted by another court of competent jurisdiction. This view is wholly inadmissible. * * * *

* * * "The offense, homicide or manslaughter, charged against Grafton was the unlawful killing of a person named. The facts which attended that killing would show the degree of such offense, whether assassination of which the civil court might have taken cognizance if it acquired jurisdicton before the military court acted, or homicide of which the military court could take cognizance if it acted before the civil court did. If tried by the military court for homicide as defined by the Penal Code, and acquitted on that charge, the guarantee of exemption from being twice put in jeopardy of punishment for the same offense would be of no value to the accused, if on a trial for assassination, arising out of the same acts, he could be again punished for the identi-

cal offense of which he had been previously acquitted.

"In Chitty's Criminal Law, vol. 1, pp. 452, 455, 462, the author says: 'It is not in all cases necessary that the two charges should be precisely the same in point of degree, for it is sufficient, if an acquittal of the one would show that the defendant could not have been guilty of the other. Thus a general acquittal of murder is a discharge upon an indictment for manslaughter upon the same person, because the latter charge was included in the former, and if it had so appeared on the trial the defendant might have been convicted of the inferior offense; and on the other hand, an acquittal of manslaughter will preclude a future prosecution for murder, for if he were innocent of the modified crime he could not be guilty of the same fact, with the addition of malice and design.'

* * * "It must, then, be taken on the present record that an affirmance of the judgment of the civil court will subject the accused to punishment for the same acts, constituting the same offense as that of which he had been previously acquitted by a military court having complete jurisdiction to try and punish him for such offense. It is attempted to meet this view by the suggestion that Grafton committed two distinct offenses—one against military law and discipline, the other against the civil law which may prescribe the punishment for crimes against organized society by whomsoever those crimes are committed—and that a trial for either offense, whatever its results, whether acquittal or conviction and even if the first trial was in a court of competent jurisdiction, is no bar to a trial in another court of the same government for the other offense. We cannot assent to this view. It is, we think, inconsistent with the principle already announced, that a general court-martial has, under existing statutes, in time of peace, jurisdiction to try an officer or soldier of the Army for any offense, not capital, which the civil law declares to be a crime against the public. The express prohibition of double jeopardy for the same offense means that wherever such prohibition is applicable, either by operation of the Constitution or by action of Congress, no person shall be twice put in jeopardy of life or limb

for the same offense. Consequently a civil court proceeding under the authority of the United States, cannot withhold from an officer or soldier of the Army the full benefit of that guarantee, after he has been once tried in a military court of competent jurisdiction.

" * * * If, therefore, a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States.

* * * *

"A different interpretation finds no sanction in the Articles of War; for the 102d Article of War * * * declares that 'no person'—referring, we take it, to persons in the Army[1] 'shall be tried a second time for the same offense.' But we rest our decision of this question on the broad ground that the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government.

* * * *

"In support of the view that the judgment of a military court against an officer or soldier of the Army for acts constituting a crime against both the civil law and the military organization, is no bar to a second trial in the civil courts for the same acts, we are referred to Fox vs. Ohio, 5 How. 410, 435; United States vs. Marigold, 9 How. 560, and Moore vs. State of Illinois, 14 How. 13, 19, 20.

" * * * It is clear that the above cases are not in point here * * * The same act, as held in Moore's case, may constitute two offenses, one against the United States and the other against a State. But these things cannot be predicated of the relations between the United States and the Philippines.

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[1] 2 Stat. 369.

The government of a state does not derive its powers from the United States, while the government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States. The jurisdiction and authority of the United States over that Territory and its inhabitants, for all legitimate purposes of government, is paramount. So that the cases holding that the same acts committed in a State of the Union may constitute an offense against the United States and also a distinct offense against the State, do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same Government—that of the United States.

* * * *

"The judgment must be reversed, and the case remanded with directions to the Supreme Court of the Philippines to order the complaint or information in the Court of First Instance to be dismissed and the plaintiff discharged from custody.

"It is so ordered."

CONCLUSIONS

The foregoing decision considered only the question of double jeopardy as applied to the Philippines and left undecided the questions involved in the 2d, 3d, and 4th assignments of error. It is probable, however, that courts will follow the decision of the United States in Dorr vs. United States, 195 U. S. 149, in which it was held with reference to a civilian, who claimed right of trial by jury in the Philippines, that "the Constitution does not without legislation and of its own force carry such right to territory so situated."

A similar principle is enunciated In re Ross, 140 U. S. 453, in which it was held that an American seaman could be punished for murder by the consular court of Japan without trial by jury. In other

words, the Constitution does not necessarily follow the flag, and persons subject to military law will, in all probability, be forced to submit to trial without jury by the civil courts of the Philippines unless they are protected from the danger by statute. The remedy is to be found, not in anxiously awaiting an interpretation of the law in an adjudicated case, or even in securing by statute the right of trial by jury, which might prove as dangerous as the present law, but rather in re-writing the Articles of War so as to give to military courts outside the territorial limits of the United States exclusive jurisdiction of all crimes committed by persons subject to military law.

The decision does not deny, but rather re-affirms the concurrent jurisdiction of state and military courts over crimes not capital committed in time of peace by persons subject to military law; such persons remain amenable to trial by both the state and military courts for the same offense, but they cannot be tried a second time for the same offense by courts deriving their jurisdiction from the same sovereignty. Thus, a trial by a court-martial bars subsequent trial for the same offense by a court of the United States, or of a territory, organized or unorganized, and vice versa, and all decisions to the contrary are overruled.

One of the most important features of the decision is that with reference to the meaning of the word "crimes" as used in the 62d Article of War. For more than half a century this word has been held to be limited by the phrase "to the prejudice of good order and military discipline," and, predicated upon this meaning of the word, we have a long line of erroneous decisions by department and other commanders.

Thus paragraph 148, Digest of the Opinions of the Judge-Advocates General, reads as follows:

"The word 'crimes' in this Article, distinguished as it is from 'neglects' and 'disorders,' means military offenses of a more serious character than these, including such as are also civil crimes—as homicide, etc."

Paragraph 158 reads as follows:

"Whether acts committed against civilians are offenses within this Article is a question to be determined by the circumstances of each case, and in regard to which no rule can be laid down. If the offense be committed on a military reservation, or other premises occupied by the army, or in its neighborhood so as to be—so to speak—in the constructive presence of the army; or if committed by an officer or soldier while on duty, particularly if the injury is done to a member of the community whom the offender is specially required to protect; or if committed in the presence of other soldiers, or while the offender is in uniform; or if the offender use his military position or that of another for the purpose of intimidation or other unlawful influence or object —the offense will in general be properly regarded as an act prejudicial to good order and military discipline and cognizable by a court-martial under this Article." * * *

Paragraph 160 enumerates offenses not cognizable under this Article, and the principles enunciated in the above paragraphs are found promulgated in the following cases:

In G. O. 59, Department of Washington, 1866, General Canby observed in regard to the theft of private property, that it "is not a military crime per se, but only as it affects, and to the extent that it does affect, the good order and discipline of the command in which it was committed."

To the same effect G. O. 8, Department of Columbia, 1872.

In a case in G. C. M. O. 58, Department of the Platte, 1872, where the accused was charged with and convicted of "theft, to the prejudice of good

order and military discipline in stealing property of a civilian," General Ord, in disapproving the proceedings, adds: "The specification does not allege a military offense." The crime is "one against the civil law and not against any law or regulation governing the military."

In G. O. 85, Department of the Cumberland, 1867, General Thomas disapproved the proceedings of general courts-martial in two cases in which the accused were charged with assault and battery with intent to kill, rob and rape, committed upon civilians, on the grounds that the offenses were of a purely civil character and such as called for the action of a "civil tribunal."

In a case of this class, promulgated in G. C. M. O. 17, Department of the Columbia, in which the proceedings and sentence were approved by the department commander, General Miles, a question was subsequently raised as to whether the court had jurisdiction of the offense—robbery by soldiers of civilians on the road between Portland, Oregon, and Vancouver Barracks.

The number of cases might be greatly extended, but the above seems sufficient to illustrate the opinion heretofore prevailing in regard to the application of the 62d Article of War. That all these cases were clearly within the jurisdiction of courts-martial is set forth in the most positive manner in the decision of the Supreme Court in the Grafton case. All decisions of the department and other commanders to the contrary are overruled, if we may use such a term, and the law is stated in the following unmistakable terms:

"The crimes referred to in that article (62d) manifestly embrace those not capital, committed by officers or soldiers of the army in violation of public law as enforced by the civil power. No crimes com-

mitted by officers or soldiers of the army are excepted by the above article from the jurisdiction thus conferred, except those that are capital in their nature."

The point is here dwelt upon at some length because post commanders continue to accept the citations in Winthrop and other authorities on military law as a correct interpretation of the 62d Article of War at the present time, whereas by the above decision all crimes committed by any person subject to military law at any time or place, are triable by courts-martial unless outlawed by the statute of limitations.

CASES CITED BY THE COURT, AND OTHER REFERENCES

Ex parte Reed, 100 U. S. 13, 231.
Ex parte Mason, 105 U. S. 696, 699.
Carter vs. Roberts, 177 U. S. 496, 498.
Carter vs. McClaughry, 103 U. S. 365, 380.
Fox vs. Ohio, 5 How. 410, 435.
U. S. vs. Marigold, 9 How. 560.
Moore vs. State of Illinois, 14 How. 13, 19, 20.
Chitty's Criminal Law, Vol. I, p. 452, 455, 462.
Bishop's Criminal Law, 7th Ed., Sec. 1050.
Commonwealth vs. Roby, 12 Pick. 503.
Stark Crim. Pl., 3d. Ed., 322.
32 Stat. 691.
2 Stat. 369.

In Re TURNER
SHERIFF vs. TURNER et al.

Circuit and District Court
S. D. Iowa, 1902
119 Federal Reporter 231

Prepared by Major Charles Gerhardt, 10th Infantry

STATEMENT OF THE CASE

In April, 1900, Congress passed a statute for the erection of a military post at Des Moines, Iowa. The site selected was about five miles south of Des Moines and about two miles from North river.

Major R. B. Turner, U. S. A., was placed in charge of the work, under the direction and orders of the War Department. As a part of the post, a sewer was being constructed which was to discharge into North river.

The owner of a tract of land a short distance below where the sewer would enter the river filed a bill in equity in the District Court of Warren County, Iowa, to restrain Major Turner and his assistant, Herrick, from laying the sewer pipe, alleging that the discharge of the sewage would so pollute the waters and bed of North river as to make his lands unfit for pasture, and by reason thereof his lands would be depreciated in value; and contended that it was taking private property for public use without making compensation therefor.

The state court issued an injunction enjoining the defendants from constructing any part of the sewer in Warren county, and from having the mouth

thereof at North river. The defendants, and particularly defendant Turner, disregarded the writ and refused to obey it. Thereupon he was arrested by the sheriff to answer as for contempt.

Before the contempt proceedings were heard, the United States attorney appeared and filed a petition to remove the case to the District Court on the ground of a "federal question" being involved. The removal was granted and the record filed in the District Court. The complainant filed a motion to remand, and the United States attorney moved to vacate the injunction. Shortly before the contempt proceedings were to be heard, a writ of habeas corpus was ordered to issue, directing the sheriff to show by what authority he detained Major Turner. The sheriff pleaded that he held him by virtue of the proceedings and orders in the contempt case.

Two actions were heard together:

1st. A suit in equity removed from a state court and heard on a motion to remand and a motion by defendant to dissolve an injunction.

2d. A proceeding by habeas corpus by the defendant in the first suit for his discharge from arrest and detention on an order of the state court for violation of injunction.

The two actions were so closely related that they were stated and decided in the one opinion.

POINTS OF LAW

1. Has a state court the jurisdiction in a proceeding brought for the sole purpose of enjoining an officer of the United States Army from doing a work which he is commanded to perform by his superior officer in the execution of an act of Congress?

Held:—That a state court is wholly without jurisdiction.

2. Can such officer be enjoined by a state court,

even though he is committing a wrong upon complainant's property, provided such act is for and on behalf of the government?

Held:—That a state court being without jurisdiction, its writ of injunction is void.

3. Is disobedience of a writ of injunction by a state court, being without jurisdiction, a contempt, subjecting to arrest and detention?

Held:—Disobedience is not a contempt; arrest and detention are without authority.

4. Is an officer of the United States Army, in the discharge of his duty, acting in obedience to commands by the Secretary of War, who in turn is executing an act of Congress, subject to arrest on a warrant or order of a state court?

Held:—Such arrest is wholly illegal.

5. May the arrest, under the authority of a state, of a federal army officer in the performance of a command by a superior officer which he dare not disobey be taken cognizance of by a federal court on habeas corpus proceedings?

Held:—That it presents a matter of urgency, and it is within the discretion of the federal courts to at once take cognizance of the case on habeas corpus proceedings, rather than allow the case to be carried through two or three years of time.

OPINION OF THE COURT

The opinion first recited the history of the case practically in the language (but not in the order) given above.

The opinion further stated:

"The act of Congress provides, first, that the site of the post shall be approved by the Secretary of War. It next provides that the army post shall be of such character and capacity as the Secretary of War shall direct and approve. * * *

"In addition to the foregoing, it also appears that the defendant Turner is an officer of the United States Army with the rank of major, and that as Major Turner, under the directions and orders of the War Department, he was, in the line of military duty, erecting said post, and as part thereof was constructing said sewer."

Some minor and some technical questions have been waived, and the substantial inquiries which, by both the circuit and district courts of the United States, must now be decided are, has a state court the jurisdiction in a proceeding brought for the sole purpose of enjoining an officer of the United States Army from doing a work which he is commanded to perform by his superior officer in the execution of an act of Congress? And can such officer be enjoined by a state court, even though he is committing a wrong upon complainant's property, provided such act is for and on behalf of the government?

"If the court had jurisdiction, then the power to issue the writ existed, and whether it was issued upon a sufficient or insufficient showing by the land owner is not a question for this court. But the question, and the only question for this court is, did the state court have jurisdiction to proceed further when it became known that Mr. Turner was Major Turner, and that Major Turner was doing the things complained of as an army officer in obedience to a command by the Secretary of War, pursuant to an act of Congress?

"If there is doubt about the matter, neither of these courts should hold that the state court was without power or jurisdiction.

"But having no doubt whatever that the state court was wholly without jurisdiction, it is my duty to so order.

"And the state court being without jurisdiction, its writ of injunction was void, and the disobedience thereof was not a contempt, and his arrest and detention was without authority. And I deem it my

duty to present, although briefly, my reasons for so holding.

"And first as to the habeas corpus case in the district court. This writ cannot be used as a writ of error or appeal to review the action of another court. But it can and should be issued and made effective when another court has acted without jurisdiction to act. Even then, at times and in cases like this, it is discretionary. It would be proper to allow the case to take its course through the Iowa courts, the Supreme Court of the state included, and then, if the party arrested is adjudged against, to present the case by writ of error to the Supreme Court of the United States. But the arrest under authority of a state, of a federal officer, and that officer one of the federal army in the performance of a command by a superior officer which he dare not disobey, presents a matter of urgency, and it is within the discretion of the federal courts to at once take cognizance of the case, and act at once, rather than allow the case to be carried through three courts, taking two or three years of time. Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868; Campbell v. Waite, 31 C.C.A. 403, 88 Fed. 102.

"Therefore it follows that the habeas corpus proceedings are the proper remedy in a case like the one at bar. The question here involved has many times been decided in all its material phases, and, in my judgment, is not open to serious question. In re Waite (D. C.) 81 Fed. 379, decided by Judge Shiras, in the Northern District of Iowa in 1897. State v. Waite, 70 N. W. 596.

"And after a careful reading and study of the opinion of Judge Shiras, I find that there is little remaining to be said, because I fully endorse it as being full and complete, and one that cannot be successfully answered. All the then existing authorities are presented and I need only cite that opinion as being expressive of my views. For if I were to attempt to elaborate upon the question I would only engage in repetition which cannot possibly serve a useful purpose. * * * * Shiras opinion affirmed 31 C. C. A. 403, 88. Fed. 102 . . . . Cited with ap-

proval, Ohio v. Thomas, 173 U. S. 276-284, 19 Sup. Ct. 453, 43 L. Ed. 699 . . . . and the Supreme Court has said that it is the law of the nation . . . . And why should this not be so? It is begging the whole question, and it is idle to say that any and all federal officers are amenable and subject to the laws, civil and criminal, of Iowa when within the state. Of course they are. The Secretary of War, the General of the armies, the Chief Justice, and even the President, perhaps, are subject to all the laws of Iowa, when in Iowa. No one disputes this. But that is not the question. Can any one of those officers, or any subordinate, in the discharge of his duties as a government officer, be subject to the laws of the state while in the state? That is the question and the only question. The state is not greater than the nation, but, on the contrary, the state is but a part, and a small part of the nation. And, if I am wrong, then instead of the President, and the Secretary of War, and the General of the army being in control, we will have army commands given by and through the courts, and an officer like Major Turner cashiered and dismissed from the service if he refuses to obey the commands from his superiors, and if he does obey them, thrown into a county jail for contempt of court.

"A much stronger showing for the exercise of jurisdiction by a state court was presented in the case of In re Neagle, 135 U. S. 1, 10 Sup. Ct. 758, 34 L. Ed. 55 . . . . But he was taken from the control and custody of the California courts by a United States court, and on habeas corpus proceedings discharged . . . .

"So that, both by reason and the highest authority of the land, I hold that an officer of the United States Army, in the discharge of his duty, acting in obedience to commands by the Secretary of War, who in turn is executing an act of Congress, is not subject to arrest on a warrant or order of a state court, and that such arrest is wholly illegal, and it follows that Major Turner is discharged from custody and detention.

"Next, as to the injunction case in the circuit court . . . . That there is a federal question involved

cannot be in doubt . . . . But that cannot be tried on injunction issued by a state court . . . . The case was properly removed to this court by order of the state court . . . . The case will stand for such further action as counsel may be advised to take. If complainant will suffer a legal wrong, he will have a legal remedy . . . . But, if his wrong shall prove to be real, our government will see to it, either that he has a remedy in the proper court, or that his wrongs are righted by being given the amplest redress. At all events he cannot control the army by writ of injunction, as great and powerful and beneficient as that writ is,''

CASES CITED

(a) Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 23 L. E. 868.

Ohio v. Thomas, 173 U. S. 276-284, 19 Sup. Ct. 453, 43 L. Ed. 699.

In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55.

(b) Campbell v. Waite, 88 Fed. 102, 31 C. C. A. 403.

In re Waite, 81 Fed. 359.

(c) State v. Waite, 70 N. W. 596.

(1) In Re PETITION COUNTESS of BUENA VISTA

and

DR. DON GUSTAVO GALLET DUPLESSIS

(Magoon--194)

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(2) O'REILLY de CAMARA v. BROOKE

135 Federal Reporter 384, District Court S. D. New York, 1905

142 Federal Reporter 858, District Court S. D. New York, 1906

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(3) O'REILLY de CAMARA v. BROOKE

209 U. S. 45, Supreme Court of the United States, 1908

Prepared by Captain Robert Alexander, 19th Infantry

The foregoing entitled case first came before the military authorities of the United States upon the following state of facts:

In 1728 the Crown of Spain, in consideration of a money payment made to it, invested the ancestor of the Countess of Buena Vista with the office of High Sheriff or Alguacil Mayor of Havana, Cuba, with a right to the fees and emoluments pertaining to that office, and a corresponding obligation on the holder of the office to perform the duties thereof.

The office itself, by the patent of cession, was declared perpetual, and was to pass by descent in the direct male line of the original grantee of the Crown. It did so pass until, the male line failing, an act of grace on the part of the Crown permitted the daughter of the last male representative to succeed, each transfer of occupancy being approved by the Crown under royal letters patent.

Upon a change of government in Spain, and the adoption of a Constitution by that country in 1875, the existence of all such perpetual, inheritable offices was declared inconsistent with the Constitution, and their abolishment provided for upon payment to the occupants of an indemnity. Pending such payment the holders were to enjoy the offices and their fees, and as payment had not been made, the representa- of the original grantee was found in 1898 still administering the office.

In 1895 a one-half interest in the office and its fees and emoluments was sequestrated by the courts, sold to pay a debt of the then incumbent, and purchased by the second party in interest who appears in the petition now under consideration.

Upon the withdrawal of the Spanish authorities, as a result of the War of 1898, the succeeding American authorities refused to allow the then holders of the office to exercise any of its functions, or receive any of the emoluments pertaining thereto. Upon this state of facts the dispossessed claimants presented to the military authorities exercising our rule in Cuba a petition, praying reinstatement in the office, or compensation for its sequestration. This petition being denied by the Governor of Havana and the Governor General of Cuba, the matter was carried to the Secretary of War and thus gave opportunity for the opinion presented in the text by the Law Officer of the Department.

It appears that the office of High Sheriff of Havana carried with it the right and duty to sit as a member of the Ayuntamiento of the city, to serve all process of the courts, to supervise the slaughter, delivery, and disposal of all meats offered for sale in in the city, to provide for the disposal of the refuse of the slaughter house, and to inspect the weights and measures.

For the performance of all these duties the possession of the office carried with it a right to certain fees, fixed by law from time to time for each class of services.

Being dispossessed of the office, and as a corollary, of the fees pertaining thereto, the claimants based their application for a restitution of the office, or compensation for their loss, upon certain contentions thus presented:

1. That said office was property.

2. That said property belonged to them on April 11, 1899, the date of ratification (proclamation) of the Treaty of Peace between Spain and the United States.

3. That the deprivation of said office by the military authorities of the United States contravened the provisions of Article 8 of said Treaty. (Magoon, 196).

The views of the War Department, as set forth in the approved opinion of its law officer, upon these points of complaint are found in extenso in the volume of Magoon's Reports (164). It is unnecessary to go further into them here than to say that the War Department held:

1. That the office, being political in its nature, could (as an officer of the courts) only depend upon the tenure of the Crown of Spain over the Island of Cuba for its continued existence.

2. That in regard to the duties connected with the supply of meat, and inspection of weights and measures, the Crown of Spain in the creation, or sale, of said office, assumed to grant to a subject the exercise of the police power of the State.

3. That by the successful outcome of the invasion of Cuba, the Crown of Spain became dispossessed of all its political rights in and over the territory of said Island; its agencies of government fell with the sovereignty upon which they were based; and all the

political relations between the people of Cuba and their former sovereign were ipso facto dissolved.

4. That such change of political relationship having taken place quite independently of the Treaty, although confirmed thereby (Havana occupied 1 January, 1899; Treaty proclaimed, 11 April, 1899) the office of the High Sheriff of Havana, being one of the executive agencies through which the Crown of Spain had exercised its now defunct political sovereignty became at once expropriated and ceased to exist.

Mr. Magoon says further (201):

"The Crown of Spain may no longer exercise prerogative rights in Cuba, and its instrument, the High Sheriff of Havana, has no greater rights than are possessed by his principal."

It was further held that while the incumbent would doubtless have a property right to the fees and emoluments of the office so long as he held incumbency, he could have no inalienable right to the office itself. (Magoon 203)

The petitioners were therefore informed that, in the view of the War Department, they were entitled to neither the office nor the compensation for its loss; and this decision, approved by the Secretary, was duly communicated to them under date of December 24th 1900.

O'Reilly de Camara v. Brooke
135 Fed. 384

This decision of the War Department being unsatisfactory to the petitioners, recourse was had to the Courts of the United States, a bill in equity being filed against General Brooke, the military governor of Cuba who caused the expropriation of the office to be carried into effect. This bill, presented in the District Court of the United States for the Southern District of New York, was demurred to by the defendant on the grounds set forth in the approved

decision of the War Department quoted above. This demurrer being argued the court ruled (Holt, Dist. Judge) that—"plaintiff's franchise was private property within the protection of the Treaty, and of which she could not be lawfully deprived without compensation; that the fact that such franchise was a monopoly, which would be void under the laws of the United States or by the common law, was immaterial, it being valid and protected by law of Spain," and further:

"If an officer of the United States takes the property of a private person for public use without compensation, he is liable in tort for the trespass, although the government may also be liable on an implied contract."

This being the ruling of the court on the demurrer, the case went to trial on its merits, and the evidence establishing the state of facts as set forth above, the Court was called upon for decision. It may be observed that the defendant presented besides the political considerations set forth in the demurrer, and which had been disallowed, two specific grounds of defense.

1. That the abolition of the plaintiff's franchise to slaughter cattle in Havana was justified as an act under the police power, in the interests of the public health.

2. That the United States Government having ratified the act of defendant the plaintiff has no further claim against him.

Upon the first defense thus summarized the court held (142 Fed. 858) that while the abatement of a nuisance was justified, such nuisance being shown to exist, such abatement could not go so far as to abolish the plaintiff's franchise, already held by the court to be property.

Upon the second defense however (ratification of act of the defendant) the court held that under the Platt Amendment, executed between the United

States and Cuba, the acts of the military authorities, when ratified by the home government, were exempt from personal responsibility.

It is rather difficult to appreciate how an agreement between the United States and Cuba could be held to affect the rights of the subjects of Spain, they holding such rights, if at all, under the Treaty of Paris, and Spain being no party to the Platt Amendment or the general treaty with Cuba. The court so held, however, saying further:

"In my opinion the plaintiff has a just claim for damages for the destruction of her property against the United States * * * or against Cuba * * * or against both governments; but she has no longer any right of action remaining against this defendant."

O'Reilly de Camara vs. Brooke, 209 U. S. 45.

The cause having been appealed from the decision of the District Court, quoted above, to the Supreme Court of the United States, came up for decision at the October term, 1907, and is finally disposed of by the court.

After considering the question of abatement of nuisance, subsequent ratification, and the other questions upon which the District Court based its conclusion, the Supreme Court reached a decision upon ground seemingly very much more solid than anything advanced by the District Court. The court says (p. 53):

"But we do not dwell longer upon the ratification of what was done during the military occupation of Cuba, or consider the question whether the ratification was needed, because we agree with the opinion of the Secretary of War that the plaintiff had no property that survived the extinction of the sovereignty of Spain. * * * No ground is disclosed in the bill for treating the right to slaughter cattle as having become a hereditament independent of its

source. But of course the right to the office, or to be paid for it, did not exist as against the United States, and, unless it did, the plaintiff's case is at an end."

CASES CITED by Mr. Magoon

STATE

State vs. Dos, R. M. Chart. (Ga.), 397, 400.
Spring vs. Russell, 7 Greenl. 273.
Charles River Bridge vs. Warren Bridge, 7 Pick. 459.
Lansing vs. Smith, 4 Wend. 9.
Callender vs. Marsh, 1 Pick. 410.
Coates vs. Mayor of New York, 7 Cow. 585.
People vs. Livingstone, 6 Wend. 526.

FEDERAL

Boyd vs. Alabama, 94 U. S. 645.
Beer Co. vs. Massachusetts, 97 U. S. 25-28.
Fertilizing Co. vs. Hyde Park, 97 U. S. 659.
Butchers' Union vs. Crescent City &c. Co. 111 U. S. 746.
Stone vs. Mississippi, 101 U. S. 814.
Bank of Columbia vs. Oakley, 4 Wheat. 244-245.
Hawkins vs. Barney, 5 Pet. 466-467.
Fletcher vs. Peck, 6 Cranch. 113.
U. S. vs. Arredondo, 6 Pet. 691.
U. S. vs. Sibbald, 10 Pet. 313.

BY DISTRICT COURT OF UNITED STATES

ENGLISH

Secy. State &c. vs. Kamachee Boye Sahaba, 13 Moore (P. C.) 22.
Sullivan vs. Spencer, Ir. R. 6 C. L. 173.
Mostyn vs. Fabrigas, 1 Cowp. 161.
Phillip vs. Eyre, L. R. 6 Q. B. 1.

Little vs. Barreme, 2 Cranch. 170.
Mitchell vs. Harmony, 13 How. 115.
Bates vs. Clark, 95 U. S. 204.
Virginia Coupon Cases, 114 U. S. 509.
Grisar vs. McDowell, 6 Wall. 393.
U. S. vs. Lee, 106 U. S. 196.
Belknap vs. Schild, 161 U. S. 10.
Slaughter House Cases, 16 Wall. 36.
Butchers &c. Co. vs. Crescent City &c. Co., 111 U. S. 746.
U. S. vs. Great Falls Mfg. Co., 122 U. S. 645.
Hill vs. U. S., 149 U. S. 593.
Langford vs. U. S., 101 U. S. 593.
Strother vs. Lucas, 12 Pet. 410.
Moore vs. Steinbach, 127 U. S. 70.

The citations given by the Supreme Court of the United States are merely upon technical points, not affecting the merits of the case as decided by them, and therefore not of general applicability.

CARRINGTON v UNITED STATES

Supreme Court of the United States, 1908

208 U. S. 1

Prepared by Captain Edgar A. Sirmyer, 8th U. S. Cavalry.

STATEMENT OF THE CASE

It appears that Carrington, while a Major of Infantry of the United States Army, was in charge of a battalion of Philippine Scouts which had been designated to go to St. Louis, U. S. A., for duty during the Louisiana Purchase Exposition at that place in 1904.

In October of the preceding year, Major Carrington wrote a letter to the executive secretary of the Philippine government suggesting that the members of his scout battalion construct a model administration building on the exposition grounds out of native materials and stating that this could be done for about $3,000 gold.

Both Governor Taft and the Exposition Board approving this project, the Civil Commission of the Philippine Islands in November passed a resolution authorizing the transfer "to the credit of Major F. deL. Carrington, 1st United States Infantry, commanding the Provisional Battalion of Philippine Scouts to be transported to St. Louis in 1904 in connection with the Philippine Exhibit" the sum of $3,000, "to be used and accounted for by Major Carrington in the construction" of the building mentioned.

It was further resolved that an additional amount of $500 be deposited to the credit of Major Carrington with which to pay some of the expenses of families of scouts allowed to accompany them to St. Louis, and further that, after certain details, the Civil Government might "designate Major Carrington as disbursing officer to receive the funds mentioned."

The resolution having been approved, Governor Taft wrote a letter addressed to Major Frank deL. Carrington, 1st U. S. Infantry, Commanding Provisional Battalion Philippine Scouts, saying:

"You are hereby designated to withdraw, receive, expend, and account for, the funds to be expended in the preparation and display of a Scout Exhibit at the Louisiana Purchase Exposition as set forth in the said resolution."

Some time afterwards, Major Carrington was charged, *as a disbursing officer of the Philippine government*, with falsifying public documents and with appropriating to his own use a part of the $3,500 above mentioned.

He was duly convicted in the court of the first instance and, upon appeal to the Supreme Court of the Philippine Islands, the conviction was confirmed.

He then brought the case before the Supreme Court of the United States by writ of error.

"The complaint alleges that the said Major Carrington 'being then and there a public official of the United States civil government of the Philippine Islands, to wit, a duly appointed and commissioned major of the First Infantry, United States Army, and the duly designated, qualified, and acting commander of the Provisional Battalion of the Philippine Scouts, and a duly appointed, qualified, and acting disbursing officer of public funds of the United States civil government of the Philippine Islands, appropriated on account of said Provisional Battalion and on

account of the Louisiana Purchase Exposition at St. Louis,' made a false voucher for the payment of 770 pesos."

In arguing the case, the counsel for the plaintiff in error said:

First.—That Major Carrington was not at any time a public officer of the United States Civil government of the Philippine Islands, nor was he a duly appointed, qualified, and acting disbursing officer for public funds of that government, as stated in the charge.

That he could not be such public officer under the laws of the United States.[1]

Second.—That he was charged with official misconduct, "abuse of his office", and that this criminal charge can only be sustained when it is shown that (a) there was such an office; (b) that he was duly appointed to that office; (c) that he qualified as such officer; (d) that he actually held that office under such appointment and qualification; (e) that the "abuse of his office" with which he was charged is an offense at the common law, the statute law, or the Philippine law.[2]

Third.—That while holding the office of major, United States Army, and on duty as such, he was not amenable to the courts or subject to the laws of the civil government of the Philippine Islands for any offense committed by him in connection with the performance of his duties as Major of Infantry.

Fourth.—That as a citizen of the United States he was entitled to trial by jury.

Fifth.—That his punishment was illegal because cruel and unusual.

The Solicitor General for the United States claimed:

First.—That the said Major Carrington, upon

[1] 22 Stat. 567; 1st Supp. Rev. Stat., ch. 124, p. 412.

[2] In re Bonner, 151 U. S. 259.

his own initiative and by resolution of the Philippine Commission and the act of the Governor of the Philippine Islands, was designated to receive, expend and account for a certain sum, and that he accepted that post and acted accordingly. He was thus an officer de facto and cannot escape liability by denying title.[1]

Second.—He was an official within the meaning of Section 401 of the Philippine Penal Code.[2]

Third.—That the provisions of Section 1222 and par. 4, Section 1860, Revised Statutes, are inapplicable in that they apply to the United States and the organized territories and not to the Philippine Islands, acquired long after the enactment of those sections.

Fourth.—That Carrington was not entitled to a trial by jury, since a soldier has no greater right in this respect than a civilian. In the United States he is amenable to trial in the civil courts for civil offenses, but if he is sent for duty to a state where the common law as to juries is not followed, he could not demand a presentment and trial under the Constitution.[3]

POINTS OF LAW DECIDED BY THE SUPREME COURT

First.—Does a single transitory act or transaction call an office into being?

Second.—Does the fact that an officer, holding a commission in the United States Army, accepts the duty of spending and accounting for a small fund of the Philippine government, make him a civil officer

[1]Hussy vs. Smith, 99 U. S. 20; Buck vs. City of Eureka, 109 California 504; Allen vs. McNeel, 1 Mills (S. C.) 229; Diggs vs. State, 49 Alabama 311; People vs. Church, 1 How. Pr. 366. State vs. Long, 76 N. Car. 254; Wendell vs. Fleming, 8 Gray 613.

[2]See 2 Viada 659, as to the wide extension and latitude of the law.

[3]Dorr vs. U. S., 195 U. S. 138; In re Ross, 140 U. S. 453.

amenable to trial in the civil courts for falsifying his accounts?

Third.—Can an officer, holding a commission in the United States Army, make himself a civil officer in view of the act of Congress prohibiting it?

Fourth.—Does the fact that an officer of the United States Army, entrusted with the expenditure of funds of the Philippine government, who signs his accounts as "Disbursing Officer" make him a civil officer?

OPINION OF THE SUPREME COURT

Mr. Justice Holmes delivered the opinion of the court.

In the review of the case, he gives the main points and the complaint as has already been given in the first part of this summary and adds that Major Carrington, in signing the false document, added after his name, "Maj. 1st Infantry, D. O.," the last letters meaning, it may be presumed, Disbursing Officer.

In the opinion given Mr. Justice Holmes says:

"At this time the plaintiff in error was an officer of the Army on the active list, detached to command a battalion of Philippine Scouts, admitted to be a part of the military establishment of the United States. Leaving names on one side, what happened was that he received $3,500 from civil sources, to be used by him in connection with his military command, in the performance of duties incident to that command. On the face of it the proposition is extravagant that the receipt of a small sum to be spent and done with forthwith in this way made him an officer of the civil government, notwithstanding the source from which it came, or the fact that he sent his accounts to the same quarter. An office commonly requires something more permanent than a single transitory act or transaction to call it into being. The letter of Governor Taft which designated Major Carrington to re-

ceive the funds says nothing about appointing him a civil or any kind of officer, nor did he qualify as one in any way. He was addressed by Governor Taft and he acted in his military capacity and under his responsibility. He has been held to that responsibility by a court-martial. The only color for an additional liability is in the words quoted from the resolution of the Civil Commission, authorizing the Civil Governor to designate Major Carrington as disbursing officer, words which the Governor wisely did not adopt, and in the fact that the plaintiff in error gave himself that name. It is unnecessary to inquire whether he could have made himself a civil officer if he had tried, in view of the act of Congress absolutely prohibiting it.[1]

"No one dreamed that he was attempting it, and if he could have succeeded at the expense of his place in the Army under Rev. Stat., Sec. 1223, no one supposed that he had done so, but he continued in his military command undisturbed.

"We think it entirely plain that the acceptance of the duty of spending and accounting for this small fund did not amount to holding a civil office within the tatutes of the United States. We see no sufficient reason to believe that the Philippine Penal Code, Art. 300, purports or attempts to reach a case like that of the plaintiff in error. The provision in Art. 401, that for this purpose every one shall be considered a public officer who, * * * by popular election or appointment by proper authority, takes part in the exercise of public functions, does not help Article 300. That also seems to contemplate an office having some degree of permanence. But however that may be, the plaintiff in error was performing no public function of the civil government of the Philippines; he was performing military functions to which the civil government contributed a little money. As a soldier he was not an official of the Philippines, but of the United States. If Philippine legislation attempted to add to the immediate responsibilities of the soldier in the course and performance of his duty under the paramount authority from which

[1] Act of March 3, 1883. c. 134; 22 Stat. 567.

that legislation derives its rights to be, we should have to inquire whether we could gather from any act of Congress the intention to permit what might become the instrument of dangerous attacks upon its power. It is a wholly different question from that where a soldier not in the performance of his duty commits an ordinary crime. But we do not understand the Penal Code to have the suggested scope.

Judgment reversed.

LIST OF CASES CITED

U. S. SUPREME COURT

In re Bonner, 151 U. S. 259.
Hussey vs. Smith, 99 U. S. 20.
Dorr vs. U.S., 195 U. S. 138.
In re Ross, 140 U. S. 453.
Grafton vs. U. S., 206 U. S. 333.

OTHER CASES AND REFERENCES

Buck vs. City of Eureka, 109 California 504.
Allen vs. McNeel, 1 Mills (S. C.) 229.
Diggs vs. State, 49 Alabama 311.
People vs. Church, 1 How. Pr. 366.
State vs. Long, 76 N. Car. 254.
Wendell vs. Fleming, 8 Gray 613.
2 Viada 695.
Philippine Penal Code, Sec. 300.
Philippine Penal Code, Sec. 401.
Sec. 1222, Rev. Stat. U.S.; par. 4, Sec. 1860, Rev. Stat. U. S.
Act of March 3, 1883, c. 134. 22 Stat. 567.

BLAKE v. UNITED STATES

Supreme Court of the United States, 1880
103 U. S. 227

Prepared by Captain Houston V. Evans, 8th Infantry

STATEMENT OF THE CASE

This case was heard at the October term, 1880, of the United States Supreme Court, having reached that court through appeal from the Court of Claims, where it had been instituted by Blake to recover the amount claimed to be due him as salary as post chaplain in the army from April 28, 1869, to May 14, 1878.

In the trial of the case before the Court of Claims, it was found that while stationed at Camp McDowell, Arizona, Chaplain Blake addressed a letter to the Secretary of War, in which he claimed that he had been subjected to unjust treatment by various officers for a number of years, requested a full investigation of the facts, and concluded his letter as follows: "but if this cannot be done, then I wish to tender to the Honorable the Secretary of War my resignation as a chaplain of the army, and to lay the facts which I have been accumulating with the greatest care before the church and country at large."

It seems that the chaplain started his letter through military channels and that it was duly forwarded through the various headquarters to the Secretary of War.

The letter was written December 24, 1868. After it came into the hands of the post commander

it was suggested to him that the Chaplain was in such a mental condition that he was not responsible for his act in writing the letter. The post commander held the letter until December 31, 1868, and then forwarded it with the recommendation that the resignation be accepted, saying in the course of his indorsement, that "the tenor of this and other communications forwarded will, no doubt, convince the department commander of his uselessness in the position he holds."

The letter being laid before the President, he accepted the resignation to take effect March 17, 1869. Each of the commanding officers through whose office the letter had passed recommended that the resignation be accepted.

On March 28, 1869, Blake telegraphed the Delegate in Congress from Arizona to the effect that he had not intended to resign and that if his letter was understood at Washington to be a resignation, to withdraw it at once.

This letter was brought to the attention of the Secretary of War, but as the President had accepted the resignation to date March 17th, the Secretary stated that the resignation could not be recalled.

When Blake, in the due course of time, received official notification of the acceptance of his resignation, he wrote a letter to the Secretary of War, under date of April 27, 1869, in the course of which he said, among other things,

"As I am not aware of having at any time resigned my commission, and as I am now in a state of feeble health, caused by efficient services in the line of duty in 1863, 1864, and since, I beg that the favorable reconsideration of the President may be given to my case, and that I may be ordered before a retiring board for examination, and to duty if fit for it."

Blake again complained in this letter of the wrong done him at Camp McDowell, Arizona.

This letter being referred to the Adjutant General of the Army, was returned with the paper on which the resignation had been accepted, and with the statement, "Chaplain Blake appears not to be of sane mind."

No further attention seems to have been given the case at that time, and on July 7, 1870, the President nominated "Alexander Gilmore, of New York, to be a post chaplain in the army, to date from July 2, 1870, vice Blake, resigned." Gilmore's nomination was duly confirmed by the Senate and he was commissioned as a post chaplain on the 14th of July, and continued thereafter to regularly receive his salary and to perform his duties as post chaplain.

It was also shown that on December 24, 1868, and for sometime prior thereto Blake had been suffering from physical disease and mental prostration, and that in the light of subsequent events, "there can be no doubt that he was then insane;" that not until after the date of his letter of resignation did the symptoms of his mental disease develop to such an extent as necessarily to lead to the conclusion that he was mentally unsound; and that he was "totally unqualified for business" and "he was not of sound mind" at the date of his telegram to the Delegate in Congress from Arizona, March 28, 1869; also that his insanity continued until about the year 1874.

On September 28, 1878, the President issued the following order:

"It appeared from the evidence, and from the reports of the Surgeon General of the Army and the superintendent of the government hospital for the insane, that Chaplain Blake was insane at the time he tendered his resignation, it is held that said res-

ignation was and is void, and the acceptance thereof is set aside.

"Chaplain Blake will be ordered to duty, and paid from the date of the resignation of Post Chaplain Preston Nash, to wit, May 14, 1878, by which resignation a vacancy was created which has not been filled. The claim of Chaplain Blake for pay from the date of his resignation to May 14, 1878, during which time his successor held the office, discharged its duties, and received pay, is not decided, but is left for the decision of the courts, where it is understood to be now pending.

"In accordance with this order, an order was issued from the Headquarters of the Army October 2, 1878, setting aside the resignation and restoring Blake to the list of post chaplains, with his original date of rank and with pay from May 14, 1878, the date on which the vacancy occurred by reason of the resignation of Chaplain Nash, and ordering him to report in person to the commanding officer, Department of Arizona, for duty."

Upon this showing, the Court of Claims dismissed the petition, and appeal was taken to the Supreme Court.

Blake's claim was based upon the ground that at the time of his letter to the Secretary of War, which was construed at the time as a resignation, he was mentally unsound and therefore irresponsible for his acts, and consequently that the letter could not be a resignation, was inoperative and did not have the effect to vacate the office.

The court thought that if the appointment of Gilmore, with the advice and consent of the Senate, to the office held by Blake, operated, *proprio vigore*, to discharge the latter from the service and to invest the former with the rights and privileges belonging to that office, it would not be necessary to inquire whether Blake was at the date of the letter of December 24, 1868, in such condition of mind as to enable

him to perform, in a legal sense, the act of resigning his office; or, whether the acceptance of his resignation followed by the appointment of his successor, by the President, by and with the advice and consent of the Senate, was not, in view of the relations of the several departments of the government to each other, conclusive, in this collateral proceeding, as to the fact of a valid effectual resignation.

Mr Justice Harlan delivered the opinion of the court, in which it was shown that from the organization of the government under the present constitution to the commencement of the civil war, the power of the President, in the absence of statutory regulations, to dismiss from the service an officer of the army or navy, was not questioned in any adjudged case, or by any department of the government.

Reference was made to the case of Ex parte Hennan, (13 Pet. 259), which involved the authority of a district judge to remove a clerk and appoint some one in his place.

In this case, the court among other things, said:

" All offices, the tenure of which is not fixed by the Constitution or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law) during the life of the incumbent, or must be held at the will or discretion of some department of the government and subject to removal at pleasure.

And if removable by pleasure, by whom is such removal to be made, the court asks. It is then stated, 'in the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment.' "

It is then shown that this power of removal from office had been a subject of much dispute and had given rise to much diversity of opinion in the early

history of the government, the point being whether the removal could be by the President alone, or must it be with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate jointly to remove in cases where tenure was not fixed by the Constitution. It is stated that it was very early adopted, as a practical construction of the Constitution, that this power was vested in the President alone, and that such would appear to have been the legislative construction of the Constitution.

In support, the following authorities were cited: 1 Kent Com. 309;

2 Story, Const. (4th ed.), sects. 1537-1540, and notes;
2 Marshal, Life of Washington, 162;
Sergeant, Const. Law, 372;
Rawle, Const., c. 14.

Reference is then made to the opinion of the Attorney General in President Tyler's Administration in support of the power of the President to remove officers of the army and navy from office, without trial by courts-martial, in which he refers, in support of his view, to the "settled construction" of 1789. (3 Story, Com. Const. 397, sect. 1538). And it is shown that the same views were expressed by subsequent attorneys-general. (4 Opin. 1; 6 id. 4; 8 id. 233; 12 id. 424; 15 id. 421.)

The Attorney General said in the Du Barry case (4 Opin. 612) that there was nothing in the Constitution or any judicial decision to limit the President's power of removal to civil officers; and there was no foundation in the Constitution for any distinction in this regard between civil and military officers. Lansing Case, (6 Opin. 4).

The opinion of Attorney General Cushing is quoted in which that officer says, "the power has

been exercised in many cases with approbation, express or implied, of the Senate, and without challenge, by any legislative act of Congress. And it is expressly reserved in every commission of the officers, both of the navy and army." (8 Opin. 231.) This was the recognized power of the President, and the established practice in the Executive Department of the government up to the passage of the Act of July 17, 1862, c. 200 (12 Stat. 596), in which it is provided among other things, that "the President of the United States be, and hereby is, authorized and requested to dismiss and discharge from the military service, either in the army, navy, marine corps, or volunteer service, any officer for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismission would promote, the public service."

In reference to this act, the Attorney General said (15 Opin. 421), and with much reason, the Supreme Court adds, that so far as it gives authority to the President, it is simply declaratory of the long established law. It is probable that the force of the act is found in the word "requested" by which it was intended to re-enforce strongly this power in the hands of the President at a great crisis of the state.

An act of Congress passed March 3, 1865, c. 79 (13 Stat. 489) provided that any officer of the military or naval service, dismissed from the service by authority of the President might, if he thought himself unjustly dismissed, make application in writing for a trial by court-martial; and that such trial would be granted aud the dismissal rendered void unless the court awarded dismissal or death.

Congress passed an act July 17, 1866, c. 176 (14 Stat. 92), in the fifth section of which is found these words:

"And no officer in the military or naval service shall, in time of peace, be dismissed from the service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

The Supreme Court thought that this provision might reasonably be construed in two ways:—

First, by giving the words a literal interpretation, it might be construed to mean, that although the tenure of office of army and navy officers is not fixed by the Constitution, they shall not in time of peace be dismissed from the service under any circumstances, or for any cause, or by any authority whatever, except in pursuance of a sentence of a court-martial to that effect, or in commutation thereof.

Second, in view of the connection in which the clause appears, following, as it does, one in the same section repealing provisions touching the dismissal of officers by the President alone, and to the assignments by him of the command of troops, without regard to the seniority of officers, it may be held to mean that, whereas under the act of July 17, 1862, as well as before its passage, the President alone was authorized to dismiss an army or navy officer from the service for any cause which, in his judgment, either rendered such officer unsuitable for, or whose dismissal would promote the public service, he alone shall not thereafter in time of peace exercise such power of dismissal except in pursuance of a court-martial sentence to that effect, or in commutation thereof.

The court rendered the opinion that the latter was the true construction of the act.

The court called attention, in its opinion, to the way in which that section of the act originated in the Senate and the supposed reasons for it, referring to the Congressional Globe, 39th Congress, pp. 3254, 3405, 3575 and 3589.

The opinion states that it is supposed to have been suggested by the serious differences existing, or which were apprehended, between the Legislature and the executive branches of the government in reference to the enforcement, in the states lately in rebellion, of the reconstruction acts of Congress.

Congress had faith in the senior officers of the army and believed that within the limits of the authority conferred by statute, they would carry out the policy of Congress, as indicated in the reconstruction acts, and suppress all attempts to treat them as unconstitutional and void, or to overthrow them by force.

Congress did not seem to have so much confidence in the President's support of its policies. Hence this provision in the act of July 17, 1866, by way of preparation for the apprehended conflict between Congress and the President.

In support of this view, the court calls attention to the second section of the act of March 2, 1867, c. 170 (14 Stat. 486), establishing the headquarters of the army at Washington, requiring all orders and instructions relating to military operations issued by the President or Secretary of War to be issued through that officer, and, in case of his inability, through the next in rank, and declaring that the general of the army "shall not be removed, suspended, or relieved from command, or assigned to duty elsewhere than at said headquarters, except at his own request, without the previous approval of the Senate, and any orders or instructions relating to military operations issued contrary to the requirements of this section shall be null and void; and any officer who shall issue orders or instructions contrary to the provisions of this section shall be deemed guilty of a misdemeanor in office," etc.

Comparing these two acts, and considering the

purpose which they were evidently intended to accomplish, the court states its conclusions as follows:

"Our conclusion is that there was no purpose, by the fifth section of the act of July 17, 1866, to withdraw from the President the power with the advice and consent of the Senate, to supersede an officer in the military or naval service by the appointment of some one in his place.

"It is, in substance and effect, nothing more than a declaration that the power theretofore exercised by the President, without the concurrence of the Senate, of summarily dismissing or discharging officers of the army and navy, whenever in his judgment the interest of the service required it to be done, shall not exist, or be exercised, *in time of peace*, exept in pursuance of the sentence of a court-martial, or in commutation thereof.

"There was, as we think, no intention to deny or restrict the power of the President, by and with the advice and consent of the Senate, to displace them by the appointment of others in their places."

It was, therefore, the opinion of the court, and it so decided, that the appointment of Gilmore, with the advice and consent of the Senate, to the office held by Blake, operated in law to supersede the latter, who thereby, in virtue of the new appointment, ceased to be an officer in the army, at least from the date of the appointment of Gilmore, and this without reference to Blake's mental capacity to understand whether his letter of December 24, 1868, was a resignation or not.

The court also decided, in view of the fact that the President had reinstated Blake, that having ceased to be an officer in the army, he could not again become a post chaplain, except upon a new appointment, by and with the advice and consent of the Senate.

Judgment affirmed.

LIST OF CASES CITED

U. S. SUPREME COURT

Ex parte Hennan, 13 Pet. 259.
Mimmick vs. United States, 97 U. S. 426.

ACTS OF CONGRESS

July 17, 1862, c. 200 (12 Stat. 596).
March 3, 1865, c. 79 (13 Stat. 489).
July 13, 1866, c. 176 (14 Stat. 92).
March 2, 1867, c. 170 (14 Stat. 486).

OPINIONS OF THE ATTORNEYS GENERAL

4 Opin. 1; 6 id. 4; 8 id. 233; 12 id. 424;
15 id. 421; 4 id. 612 (Du Barry's Case);
6 id. 4 (Lansing's Case); 8 id. 231.

OTHER AUTHORITIES

1 Kent Com. 309; 2 Story Const. (4th Ed.), sects. 1537-1540, and notes;
2 Marshall, Life of Washington, 162;
Sergeant, Const. Law, 372;
Rawle, Const. 397, sect. 1538;
Congressional Globe, 39th Congress, pp. 3254, 3405, 3575, and 3589.

RUNKLE v. UNITED STATES

Supreme Court of the United States, 1886

122 U. S. 543

Prepared by Captain E. J. Williams, 5th Infantry

STATEMENT OF THE CASE

Benjamin P. Runkle served as a captain of the 13th Ohio Volunteer Infantry from April 22, 1861, until November 18, 1861, at which time he became a major and served as such until he was mustered out August 18, 1862.

On the following day he was mustered in as a colonel of the 45th Ohio Volunteer Infantry, and served as such until he was mustered out July 11, 1864.

He then held an appointment as a lieutenant-colonel of the Veteran Reserve Corps from August 29, 1864, until October 5, 1866, on which latter date he was mustered out of that organization.

On the day following his muster out from the Veteran Reserve Corps he accepted an appointment as a major of the 45th U. S. Infantry, and was placed on the retired list as a major on the 15th of December, 1870.

Major Runkle was placed on duty as a disbursing officer of the Bureau of Refugees, Freedmen, and Abandoned Lands, for the State of Kentucky on April 11, 1867, and remained continuously on that duty, even after his retirement, until he was placed in arrest because of charges preferred on account of irregularities connected with his money accounts.

On June 25, 1872, the War Department issued a Special Order, No. 146, convening a court-martial at Louisville, Kentucky, on the 5th of July, 1872, for the trial of a certain officer, and such other prisoners as might be brought before it.

Major Runkle was arraigned before this court and tried on two charges:

1. "Violation of the Act of Congress approved March 2, 1863, c. 67, Sec. 1."

2. "Conduct unbecoming an officer and a gentleman."

There were thirteen specifications alleged under the 1st charge, and fourteen under the 2d charge. All of the specifications, with the exception of the 1st and 5th under the 1st charge and the 5th and 14th under the 2d charge, alleged acts to have been committed by the accused in 1871 and subsequent to his being placed on the retired list; and the specifications excepted above alleged acts to have been committed by the accused in 1870 and prior to his having been placed on the retired list.

Major Runkle was found guilty on eighteen of the twenty-eight specifications, three of the specifications on which he was found guilty alleging offenses committed prior to his retirement from the army. He was also found guilty on both charges and the sentence of the court was as follows:

"To be cashiered; to pay the United States a fine of $7,500; and to be confined in such penitentiary as the President of the United States may direct, for the period of four years; and in the event of the non-payment of the fine at the expiration of four years, to be kept in confinement in the penitentiary until the fine be paid, the total term of imprisonment, however not to exceed eight years."

The proceedings were regularly transmitted to the Secretary of War, who endorsed thereon the following orders:

"The proceedings in the foregoing case of Major Benjamin P. Runkle, retired, United States Army, are approved, with the exception of the action of the court * * * * *

"The findings and sentence are approved.

"In view of the unanimous recommendation by the members of the court that the accused shall receive executive clemency on account of his gallant services during the war, and of his former good character, and in consideration of evidence, by affidavits presented to the War Department since his trial, showing that the accused is now, and was at the time when his offense was committed, suffering under great infirmity in consequence of wounds received in battle, and creditable representations having been made that he would be utterly unable to pay the fine imposed, the President is pleased to remit all of the sentence, except so much thereof as directs cashiering, which will be duly executed.

Wm. W Belknap,
Secretary of War."

In accordance with the above, War Department General Order, No. 7, dated January 16, 1873, was published and announced that:

"Major Benjamin P. Runkle, U. S. Army (retired), ceases to be an officer of the army from the date of this order."

Major Runkle's name did not again appear on the Army Register until August 4, 1877, the date of his restoration to the army, the circumstances of which were as follows:—

Upon application of Major Runkle, President R. B. Hayes issued the following Executive Order (only those parts of the order necessary to a complete understanding of the case are quoted):

"Executive Mansion,
"*Washington, August 4, 1877.*

* * * * *

"Third. That subsequent to the date of said General Order, No. 7, to wit, on the 16th day of Jan-

uary, 1873, Major Runkle presented to the President a petition setting forth that the proceedings of said court had not been approved by the President of the United States, as required by law; that said conviction was unjust; that the record of said proceedings was not in form or substance sufficient in law to warrant the issuing of said order, and asking the revocation and annulment of the same.

"Fourth. That in pursuance of this petition, the record of the official action theretofore had in the premises was, by direction of the President, Ulysses S. Grant, referred to the Judge-Advocate General of the United States Army for review and report.

"Fifth. That thereupon the Judge-Advocate General reviewed the case, and made his report thereon, in which it is reported and determined, among other things, that in the proceedings had upon the trial of the case by said court, 'it is nowhere affirmatively established that he (Major Runkle) actually appropriated any money to his own use.'

"It also appears in said report that the conviction of said Runkle upon charge one, as aforesaid, is sustained upon the opinion that sufficient proof of the crime of embezzlement on the part of the accused was disclosed by the evidence before the court. And with respect to charge two no reference to the same is made in said report, except to deny the sufficiency of the evidence in the case, for a conviction upon the fourteenth specification thereof; and it is also to be observed that the thirteen remaining specifications under this charge are identical with the thirteen specifications under charge one.

"The Judge Advocate General further finds and determines in said report as follows, to wit: 'For alleged failures to pay, or to pay in full,' on the part of sub-agents, 'I am of the opinion that the accused cannot justly be held liable.'

"Sixth. That no subsequent proceedings have been had with reference to said report, and that the said petition of the said Runkle now awaits further and final action thereon.

"Whereupon, having caused the said record, together with said report, to be laid before me, and

having carefully considered the same, I am of the opinion that the said conviction is not sustained by the evidence in the case, and the same, together with the sentence of the court thereon, are hereby disapproved; and it is directed that said Order No. 7, so far as it relates to said Runkle, be revoked.

"R. B. HAYES."

Major Runkle, then, on August 7, 1877, made claim to the Paymaster General for back pay for the entire time from January 16, 1873, which amount was, after going through the usual routine in such cases, paid to him. He continued to draw his pay as an officer on the retired list, and up to January 1, 1884, had drawn $23,585.62, the amount of money accruing to him since the date of General Order No. 7, signed by Secretary of War William W. Belknap.

On the 14th of September, 1882, Major Runkle filed with the Second Auditor of the Treasury Department a claim for longevity pay as an officer in the United States Army, "retired from active service," basing his claim on the decision of the Supreme Court, in the case of United States vs. Tyler.[1]

This claim of Major Runkle was referred to the Court of Claims by the Secretary of the Treasury on the 27th of June, 1883, requesting an opinion upon the following questions:

"1st. Was the court-martial that tried Benjamin P. Runkle duly and regularly organized, and had it jurisdiction of the person of said Runkle, and of the charges upon which he was tried?

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[1] "We are of the opinion that retired officers are in the military service of the government, and that the increased pay of ten per cent for each five years' service applies to the years so passed in the service as well as before.

"We also hold that the words 'current yearly pay,' in Section 1262, require that, when the increased pay for any period of five years is to commence, the ten per cent must be counted on the regular salary added to its increase by any previous periods of five years; so that the original salary of the rank, and any additions of ten per cent previously earned for periods of five years constitute the current yearly pay on which said ten per cent is to be calculated."

"2d. Were the proceedings and finding of said court-martial regular and the sentence duly approved in part by the President of the United States as required by law?

"3d. Was Benjamin P. Runkle legally cashiered and dismissed from the Army of the United States, in pursuance of said court-martial and subsequent proceedings?

"4th. Was the President of the United States authorized and empowered by executive order to restore said Runkle to the army, as it was claimed he was restored by the order of August 4, 1877?

"5th. Is Benjamin P. Runkle now a retired army officer, with the rank of major, and, as such officer, entitled to longevity pay under what is known as the Tyler decision?"

Upon the transfer of Major Runkle's claim to the Court of Claims, and in accordance with the rules of practice in that court, he (Major Runkle) presented his petition to that court. The United States put in a counter-claim for all the moneys that had been paid to Major Runkle from January 16, 1873, to January 1, 1884, as a major on the retired list, and claiming that Major Runkle was not a major in the army during that time, and, hence, not entitled to draw pay therefor.

The conclusions of law by the Court of Claims were as follows:

"1. That the claimant is not entitled to recover longevity pay.

"2. That the defendants are not entitled, under their counter-claim, to recover the pay received by the claimant as a retired major, which accrued after the 4th of August, 1877, amounting to $14,390.35.

"3. That the defendants are entitled, under their counter-claim, to recover from the claimant $9,195.27, being the amount paid him for the time between January 16, 1873, and August 4, 1877. (19 C. Cl. 395.)"

The opinion of the Court of Claims was delivered by C. J. Drake, and states that the question to be

determined is whether or not the sentence of the court-martial in the case of Major Runkle was confirmed by President Grant. After citing several instances of like confirmations of sentences of dismissal, the opinion states:

"Our unhesitating judgment is that the finding and sentence of the court were legally confirmed by President Grant, and that from the date of the official promulgation of their confirmation the claimant ceased to be an officer of the army."

Granting that this conclusion is correct, it is difficult to understand how the Court of Claims could arrive at the conclusion that the United States was not entitled to recover the $14,390.35 received by the claimant as a retired major of the U. S. Army, and accruing to him after August 4, 1877, the date of the order of President Hayes. If the confirmation of the sentence of the court dismissing Major Runkle was legal, then he ceased to be an officer of the U.S. Army, became a civilian, and could be reinstated only through the means of a re-appointment by the President and a confirmation by the Senate. Such being the case, no moneys had properly accrued to him as a major after the date of the order confirming his dismissal. A complete record of the decision of the Court of Claims is not available.[1]

[1]Digest of Opinions, J. A. G., 1199. "When a legal sentence of a dismissal has been duly confirmed and executed, the power over the case of the reviewing officer (whether the President or the commanding general in time of war) is exhausted. The reviewing authority, as such, is functus officio. * * By no exercise of that power (pardoning power) can the sentence be removed or remitted, or the office lost be restored. * * And the law has provided no court of appeal or other revisory authority by which the same may be reopened or set aside; the only remedy is by a new appointment."

12 Opins. At. Gen. 548. "The case of an officer who has been thus reduced in rank differs essentially from that of an officer who has been dismissed from the service by sentence of a military court. After the latter is duly confirmed and executed, the dismissed officer cannot be reinstated by means of a pardon, or in any other manner than by a new appointment

Both parties appealed from the Court of Claims to the Supreme Court of the United States.

The opinion of the Court was delivered by Mr. Chief Justice Waite, and two questions were considered.

1. Were the proceedings of the court-martial which tried Major Runkle irregular?

2. Was the sentence of the court-martial duly approved by the President, according to law?

The 65th Article of War in effect at the time of the proceedings was as follows:

"Any general officer commanding an army or colonel commanding a separate department, may appoint general courts-martial, whenever necessary. But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time be-

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and confirmation by the Senate. This is because the execution of the judgment in effect abrogates the officer's commission, and entirely dissolves his connection with the service, placing him in exactly the same situation relatively thereto which he occupied previous to his original appointment, and, moreover, a pardon, it has been said, does not operate to restore an office forfeited."

4 Opins. At. Gen. 274. "The case of Passed Midshipman Moorhead stands precisely, as far as the law is concerned, upon the same footing with that of Lieutenant Whitney. The facts disclosed by the record show it to be one in which the sentence pronounced and executed was peculiarly harsh and severe. The proceedings of the court held in this case I do not deem necessary particularly to discuss. I have no difficulty, however in stating that they were exceedingly irregular. Testimony, manifestly illegal, was admitted, whilst that which was legal was ruled to be indispensable. But still I do not perceive how these irregularities can be regarded as annulling the judgment pronounced. They might have been appealed to as reasons why the revisory power, when called to act upon the proceedings, should not have approved the finding and sentence of the court; but that approval having been signified, they cannot avail wholly to avoid everything that has been done. The judgment of the tribunals created by law has been pronounced and carried into effect, and the officer upon whom it operated was henceforth unquestionably out of the service."

Also see Ex Parte Garland, 4 Wallace 333, 381.

ing; neither shall any sentence of a general court-martial, in time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders, in the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer, for the time being, as the case may be."

From the above, the court finds that the sentence of a general court-martial, in time of peace, which directs the dismissal from service or the cashiering of a commissioned officer is inoperative until it is properly approved by the President.

It also finds that a court-martial organized under the laws of the United States is a court of limited and special jurisdiction which is brought into existence for the performance of a particular duty or for a special purpose, and that when that object is accomplished, it is dissolved; that to give effect to its sentences, it must appear affirmatively that the court has jurisdiction; that its sentence was conformable to law; and that all statutory requirements with regard to its proceedings have been complied with. This must be shown positively and not left to be inferred argumentatively.

The question which the Court considered it important to consider was whether or not the approval of the President in the case of Major Runkle was positively shown.

The Court also expressed the opinion that the action required of the President is not administrative, but is one of a judicial character. The Court does not deny that the President, in exercising his power under the Constitution, may do so through the proper executive department; but decides that the ac-

tion required of him upon the proceedings of a court-martial are not only of a judicial character; but being such, necessitate his personal consideration and judgment, and that that judgment must be authenticated in such a manner as to show affirmatively, not merely in an argumentative way, that it is the personal judgment of the President. The Court quotes 2 Opins. At. Gen., 21:

"Undoubtedly the President, in passing upon the sentence of a court-martial, and giving to it the approval without which it cannot be executed, acts judicially. The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subject to the uncontrolled will of man, but which must be adjudged according to law. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence cannot be executed, is as much a part of this judgment, according to law, as is the trial or sentence. When the President, then, performs this duty of approving the sentence of a court-martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law."

The Court then discusses the question as to whether or not the sentence dismissing Major Runkle was properly approved by President Grant, in the following language:

"It does not appear affirmatively that it was disapproved by President Hayes; and if not approved by President Grant, Runkle was never legally out of the service. It is true that, if it had been approved, the subsequent disapproval would have been a nullity, and could not have the effect of restoring him to his place; but if not approved, he was never out, and the disapproval kept him in, the same as if the

court-martial had never been convened for his trial. In Blake vs. United States, 103 U. S. 227, followed in United States vs. Tyler, 105 U. S. 244, it was decided that the President had power to supersede or remove an officer of the army by appointment, by and with the consent of the Senate, of his successor; but here there was nothing of the kind. Runkle was never removed otherwise than by the sentence of the court-martial, and the order of the War Department purporting to give it effect."

Referring to the order, the court says:

"It is signed by the Secretary of War alone and, the personal action of the President in the matter is nowhere mentioned, except in the remission of a part of the sentence. There is nothing which can have the effect of an affirmative statement that the 'whole proceedings' had been laid before him for action, or that he personally approved the sentence. The facts found by the Court of Claims show that the proceedings, findings, and the sentence of the court-martial 'were transmitted to the Secretary of War, and that he wrote the order thereon', but there they stop. What he wrote is in the usual form of departmental orders, and, so far as it relates to the approval of the sentence, indicates on its face departmental action only.

"What follows in the order does not, to say the least, clearly show the contrary. It relates to the executive clemency which was exercised, and then, for the first and only time, it appears, in express terms, that the President acted personally in the matter. It is there said: 'The President is pleased to remit all of the sentence, except so much thereof as directs cashiering.' If all the rest of the order was the result of the personal action of the President, why was it referred to here and not elsewhere? Might it not be fairly argued from this that the rest was deemed departmental business, and that part alone personal which required the exercise of the personal power of the President, under the Constitution, of granting pardons? And besides, according to the order as it stands, the action of the President was had, not on the 'whole proceedings,' but 'in view of the unanimous recommendations of the mem-

bers of the court,' 'the former good character' of the accused, and 'in consideration of evidence, by affidavits, presented to the War Department since the trial,' and 'creditable representations.' If 'the whole proceedings' had actually been laid before him, as required by the Article of War, it was easy to say so.''

The court calls attention also to the fact that the words at the end of the order directing that the sentence will be duly executed are immediately preceded by that part of the order showing the remission of a part of the sentence, which remission is clearly shown to be the personal action of the President, and draws the conclusion that the failure to show that the direction for the execution of the unremitted portion of the sentence was the personal action of the President indicates clearly that the Secretary of War was acting all the time on the idea that the personal judgment of the President was required only with reference to that part of the proceedings requiring the exercise of the pardoning power, and that departmental action was all that was necessary in regard to the rest of the proceedings.

The court then finds that it is nowhere shown that the proceedings of the court-martial had ever been approved or confirmed in whole or in part by the President and in accordance with the Article of War requiring such action; and that, therefore, Major Runkle was never legally dismissed from the service or cashiered. That being true, the court finds that the action of President Hayes in disapproving the finding and sentence of the court-martial is legal; that Major Runkle was never legally out of the service, and that he is entitled to his longevity pay, all money that he had already received as regular pay, both before and after the order of Secretary Belknap.

CONCLUSIONS

The conclusions of the court in this case settle only one main question:

That the action of the President in approving or disapproving the finding and sentence of a court-martial which directs the dismissal or cashiering of an officer is of a judicial nature, requiring the exercise of a personal judgment, and that such action, to be legal, must be shown positively—not argumentatively or left to be inferred.

The court does not go so far as to decide that any particular form of order is necessary, nor that the signature of the President must be attached thereto.

CASES CITED

U. S. vs. Tyler, 105 U. S. 244.
Ex parte Garland, 4 Wall., 333.
Blake vs. U. S., 103 U. S. 224.
Opins. At. Gen., 11—21.

BADEAU vs. THE UNITED STATES

Supreme Court of the United States, 1888
130 U. S. 439

Prepared by Captain E. D. Scott, 5th Field Artillery

STATEMENT OF THE CASE

Adam Badeau, 1st Lieutenant, 4th Infantry, was retired with the rank of captain to date from May 18, 1869, for disability incident to a wound received in service. From that date until the date of the suit he was on consular or diplomatic service, except for for two short periods.

On May 7, 1878, a War Department order issued, dropping him from the Army, to date from the date of his retirement, under the provisions of paragraph 1223, Revised Statutes, it being held that he had forfeited his commission in the Army by the acceptance of a diplomatic post. He promptly applied to have the order revoked on the ground that he came within the class of officers named in the proviso to paragraph 2, Act of March 3, 1875, and, on proper proof that this was so, his name was restored to the retired list July 3, 1878.

While holding diplomatic or consular positions he drew no pay as an army officer, but did draw such pay while not on such duty. He finally decided that he was entitled to army pay during all this time, and filed a claim for the amount with the Treasurer of the United States, and an additional claim for increase of pay based on length of service, the total amounting to more than $18,000.00.

The Treasurer, on June 21, 1883, transmitted the

claim to the Court of Claims, together with all vouchers, proofs, documents, etc., in the case, "that the same might be proceeded in, in said court, as if originally commenced therein by the voluntary action of the claimant."

February 19, 1884, Badeau himself filed a petition in that court with supplementary evidence as to service, etc.

March 8, 1884, the United States had filed a general traverse to the claim, and on February 10, 1885, filed a counter claim for all pay drawn by Badeau since the date of his retirement, alleging that in all this time he was not in the army nor an officer thereof. The United States also pleaded the statute of limitations to most of the claim.

The court found the facts as stated above, but being equally divided as to the claimant's right to recover, framed the following conclusion of law for the purpose of appeal:

"The petition of the claimant and that of the counter-claimant should both be dismissed." Judgment was entered accordingly.

Appeals were taken by both parties to the Supreme Court of the United States, the records being filed therein August 10 and October 5, 1887.

October 5, 1888, a stipulation was filed, adding certain records, conclusions and orders of the Court of Claims, and certain matters introduced in evidence at a stage of the case prior to the final findings.

The following points of law arose in this case:

1. Did Badeau cease to be an officer in the army when he accepted a diplomatic post?

2. While accepting pay under a diplomatic or consular appointment, is a retired army officer entitled to receive pay as such?

3. What is the status of an officer whose name is placed on the retired list in apparent compliance

with law, and is money paid to him as salary recoverable by the United States?

Chief Justice Fuller delivered the opinion of the court, Justice Miller dissenting.

The opinion quotes from various statutes relative to retired officers of which those directly bearing on this case are as follows:

Act of January 21, 1870 (1259 Rev. Stat.):

"No retired officer of the Army shall hereafter be assigned to duty of any kind, or be entitled to receive more than the pay and allowances provided by law for retired officers of his grade,"

And provided that any assignments then existing be vacated within thirty days. Later this was modified so as to exempt officers wanted for duty at the Soldiers' Home.

Paragraph 18, Act of July 15, 1870 (Rev. Stat. 1222), enacted:

"That it should not be lawful for any officer of the Army of the United States on the active list to hold any civil office, whether by election or appointment, and any such officer accepting or exercising the functions of a civil officer shall at once cease to be an officer of the Army and his commission shall be vacated thereby."

Section 2, Act of March 30, 1868 (Rev. Stat. 1223):

"That any officer of the Army or Navy of the United States who shall, after the passage of this act, accept or hold any appointment in the diplomatic or consular service of the government shall be considered as having resigned his said office, and the place held for him in the military or naval service shall be deemed and taken to be vacant, and shall be filled in the same manner as if the said officer had resigned the same."

It was in conformity with the latter that Badeau was dropped from the Army in 1878. The Supreme Court observes that under the laws just quoted a

retired officer was barred from holding a consular or diplomatic office, but not from a civil office, while an officer of the active army was barred from all three.

But Section 2, Act of March 3, 1875, providing for the rank and pay of officers retired for disability, contained a proviso that the terms of this act should not apply to officers who had been retired by reason of the loss of an arm or leg, or its permanent disabling by reason of wounds received in action, and that "every such officer now borne on the retired list shall be continued thereon, notwithstanding the provisions of Section 2, Chapter 38, Act of March 30, 1868."

Badeau's case was held to be clearly within this proviso, and that he could properly hold a position in the diplomatic or consular service.

Concerning the question of pay, the court quotes Sections 1763, 1764 and 1765 of the Revised Statutes:

"No person who holds an office, the salary or annual compensation attached to which amounts to the sum of $2,500.00, shall receive compensation for discharging the duties of any other office, unless expressly authorized by law.

"No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other department, and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.

"No officer in any branch of the public service, or any other person whose pay, salary or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

Since General Badeau received $7,500.00 a year

in one post and $6,000.00 a year in another later, it was certain that he was inhibited from receiving any other pay, allowance, etc., unless expressly authorized by law, which was not claimed.

"It has been decided that a person holding two offices or employments under the government, when the services rendered or which might be required under them, were not incompatible, is not precluded from receiving the salary or compensation to both.[1] But the Treasury Department did not apparently regard this case as falling within that exception, and we agree with that conclusion."[2]

The court held that Badeau's right to hold two offices did not change the general policy of the law, and that while absent from the country in the discharge of continuous official duties inconsistent with subjection to the Rules and Articles of War and other incidents of service, he was not entitled to pay as a retired officer.

As to the counter claim, although the rule that money paid under a mistake of law is not recoverable is held not to apply in a case where the United States is a party, on the ground that the government is not bound by the mistakes of its officers, whether of law or fact, still the court considers that Badeau was a de facto officer if not de jure, and was entitled to keep what army pay he had received.[3]

Judgment of the Court of Claims was therefore affirmed.

CASES CITED

SUPREME COURT

U. S. vs. Brindle, 110 U. S. 688.
McElrath vs. U. S., 102 U. S. 426.

[1]Converse vs. U. S., 21 How. 463; U. S. vs. Brindle, 110 U. S. 688.

[2]U. S. vs. Shoemaker, 7 Wall. 338; Stansbury vs. U. S., 8 Wall. 33; Hoyt vs. U. S., 10 How. 109, 141.

[3]U. S. vs. Kirkpatrick, 9 Wheat. 720; U. S. vs. Bank of Metropolis, 15 Pet. 377; McElrath vs. U. S., 102 U. S. 426.

Wood vs. U. S., 107 U. S. 414, 417.
Converse vs. U. S., 21 How. 109, 141.
U. S. vs. Shoemaker, 7 Wall. 328.
Stansbury vs. U. S., 8 Wall. 33.
U. S. vs. Kirkpatrick, 9 Wheat. 720.
U. S. vs. Bank of Metropolis, 15 Pet. 377.
R. S. 1222, 1223, 1256, 1258, 1259, 1260, 1763, 1764, 1765.

SWAIN v. UNITED STATES

Supreme Court of the United States, 1897

165 U. S. 553

Prepared by Captain F. M. Caldwell, 12th Cavalry

STATEMENT OF THE CASE

In 1884 David G. Swain, Judge-Advocate General, United States Army, was tried by a general court-martial appointed by the President, upon charges prepared by direction of the Secretary of War.

The proceedings were twice returned by the President to the court-martial for reconsideration of the findings on certain charges and of the sentence with recommendations for a more severe sentence.

In conformity with these recommendations the court twice changed the sentence; and the third sentence, viz.:

"To be suspended from rank and duty for twelve years and to forfeit one-half of his monthly pay each month for the same period,"

was approved February 24, 1885.

In February, 1891, General Swain filed a petition in the Court of Claims asking that, for certain reasons therein set forth, the proceedings, finding and sentence of the court-martial be set aside and that judgment be rendered awarding him the amount of his pay and allowances retained in pursuance of the said sentence. The Court of Claims made certain findings of fact and on February 27, 1893, entered a final judgment dismissing the petition. From the judgment appeal was taken to the Supreme Court.

POINTS OF LAW DECIDED

1. Power of the President to appoint a general court-martial.

2. Whether routine orders directing the investigation of accusations against an officer and appointing a court-martial for his trial on charges preferred as the result of such investigation, constitute the President (or appointing officer) his accuser or prosecutor within the meaning of the 72d Article of War.

3. Power to attack the sentence of the court-martial collaterally in a civil court by inquiry whether the trial by officers inferior in rank to the accused was or was not avoidable.

4. Power of a civil court to set aside the proceedings and sentence of a court-martial when it has jurisdiction and acts within the scope of its lawful powers.

5. Right of a reviewing officer to return the proceedings more than once to a court-martial for reconsideration, with recommendations for a more severe sentence.

6. Right of an officer of the army to emoluments or allowances when suspended from duty.

OPINION

Justice Shiras delivered the opinion of the court.

The theory of the claimant's petition was that the sentence of the court-martial was void and constituted no defense to his action for pay retained under it.

The contentions urged on behalf of the appellant were briefly as follows:

First.—That the President had no authority to appoint the court-martial in question.

The argument was based on the language of the 72d Article of War, viz.:

"Any general officer commanding the army of the United States, or a separate army or a separate

department shall be competent to appoint a general court-martial either in time of peace or in time of war.

"But when any such commander is the accuser or prosecutor of any officer under his command, the court shall be appointed by the President and its proceedings or sentence shall be sent directly to the Secretary of War, by whom it shall be laid before the President for his approval or orders in the case."

It was claimed in effect, that in the 72d Article of War just quoted, is found the only power of the President as commander-in-chief of the army to appoint a general court-martial.

The court approved the conclusions of the Court of Claims that it is within the power of the President of the United states, as commander-in-chief, to validly convene a general court-martial even where the commander of the accused officer to be tried is not the accuser.

Second.—It was contended that the President was the accuser or prosecutor of the appellant within the meaning of the 72d Article of War, because he had ordered a court of inquiry to investigate certain charges made by a civilian against General Swain, and had later appointed a general court-martial for the trial of the appellant upon charges prepared by direction of the Secretary of War upon receipt of the report of the court of inquiry.

This contention was held to be wholly unfounded, the court stating that such routine orders could not be construed as making the President his accuser or prosecutor.

By inference, this decision extends to any military commander under similar circumstances.

Third.—That the court was constituted in violation of the 79th Article of War which provides " * * and no officer shall, when it can be avoided, be tried by officers inferior to him in rank."

It appears that a majority of the court-martial, as organized for the trial, was composed of colonels, and it was argued that the record did not disclose affirmatively that the appointment of officers inferior in rank to the accused was unavoidable by reason of some necessity of the service.

The court, quoting from the cases of Martin vs. Mott, 12 Wheat. 19, 24, 35, and Mullan vs. United States, 140 U. S. 140, 245, held that the presumption must be that the President in detailing the officers named to compose the court-martial, acted in pursuance of law, and that the sentence could not be collaterally attacked by going into an inquiry whether the trial by officers inferior in rank to the accused was or was not avoidable.

Fourth.—That the Court of Claims erred in overruling an exception to the action of the court-martial in permitting, after objection made, an officer to sit on the trial whom the appellant had severely criticised in official reports and whose enmity and dislike had been thereby incurred.

It was held that the provisions of the 88th Article of War disposed of this question and that the decision of the court-martial in determining the validity of a challenge could not be reviewed by the Court of Claims in a collateral action.

Fifth.—Various errors of procedure on the part of the court-martial were alleged in the petition. It was the opinion of the Court of Claims that the errors so assigned could not be reviewed collaterally and that they did not effect the legality of the sentence.

This opinion was approved by the Supreme Court as being in accord with the authorities.

The court stated:

"* * * the court-martial having jurisdiction of the person accused, of the offense charged, and having acted within the scope of its lawful powers, its proceeding and sentence cannot be reviewed or set aside by a civil court."

Sixth.—That no offense under the 62d Article of War was shown by the facts and that the Court of Claims should have so found and have held the sentence void.

It was held that the conclusions of a court-martial in such matters cannot be controlled or reviewed by the civil courts.

Seventh.—That the action of the President in twice returning the proceedings to the court-martial, urging a more severe sentence, was without authority of law and that the last sentence, having resulted from such illegal conduct, was absolutely void.

Held that the President acted lawfully and in conformity with Army Regulations; that the court in modifying its sentence was acting within the scope of its lawful authority and that its proceedings could not be collaterally impeached for any mere error or irregularity.

It was further held that the Court of Claims did not err in deciding that where an officer is suspended from duty, he is not entitled to emoluments or allowances.

The court concluded its opinion as follows:

"As we have reached the conclusion that the court-martial was duly convened and organized and that the questions decided were within its lawful scope of action, it would be out of place for us to express any opinion on the propriety of the action of the court in its proceedings or sentence.

"If the appellant was harshly dealt with and a sentence of undue severity finally imposed, the remedy must be found elsewhere than in a court of law."

DECISION

"The decree of the Court of Claims is—affirmed."

Cases Cited

Dynes v. Hoover, 20 How. 65, 82.
Keyes v. United States, 109 U. S. 336.

Smith v. Whitney, 116 U. S. 167.
Runkle's Case, 19 C. Cl. 396, 409.
Martin v. Mott, 12 Wheat. 19, 34, 35.
Mullan v. United States, 140 U. S. 140, 245.
Ex parte Reed, 100 U. S. 13.
Johnson v. Sayre, 158 U. S. 109.
United States v. Fletcher, 148 U. S. 84.
United States v. Phisterer, 94 U. S. 219.

STANTON CARTER v. McCLAUGHRY

Supreme Court of the United States, 1902
183 U. S. 365

Prepared by Major C. S. Farnsworth, 16th U. S. Infantry.

STATEMENT OF THE CASE

Captain Oberlin M. Carter, Corps of Engineers, U.S. Army, stationed in Savannah, Ga., in charge of river and harbor improvements, was tried in 1899 by court-martial on four charges,

1st Charge.—Conspiracy to defraud the United States in violation of the 60th A. W.

2d Charge.—Causing false and fraudulent claims to be made against the United States in violation of the 60th A. W.

3d Charge.--Conduct unbecoming an officer and a gentleman in violation of the 61st A. W.

4th Charge.—Embezzlement as defined in Section 5488, Revised Statutes, in violation of the 62d A. W.

Under each charge there were two or more specifications. To one or more specifications under each charge he pleaded the Statute of Limitations, which plea was sustained by the court-martial.

To four specifications under Charge III (Conduct unbecoming, etc.) he was found not guilty. He was convicted of the other specifications and of all four charges and the sentence was approved by the President, September 29, 1899.

The finding of the court of guilty as to twelve of the specifications was disapproved by the Presi-

dent but he approved the finding of guilty of at least one specification under each charge.

In the specifications of which he was found guilty and of which the President approved the findings Carter was charged: With conspiracy to defraud the United States on two occasions in 1896 and 1897 by manipulating advertisements, and information as to giving out of contracts, receiving proposals and making awards for bids for material and labor for certain engineering improvements in Savannah harbor and Cumberland Sound, Ga., so that the Atlantic Contracting Co. obtained the contract, furnished material inferior to that called for in the contract and was paid over $575,000.00 for such inferior material as though the material was as called for in the contract; with causing false and fraudulent claims to be made against the United States by causing the Atlantic Contracting Co. to present claims for over $575,000.00 for inferior material furnished as above indicated; with entering on government pay rolls the names of certain persons as laborers and causing them to be paid as such whereas they had rendered no services as laborers; with fraudulently allowing accounts of $121.60, $384.00 and $108.88 of the Atlantic Contracting Co. against the United States for certain piling, pile work and pile dams; with conduct unbecoming an officer and a gentleman by paying out United States money on fraudulent claims amounting to over $576,000.00 as above indicated, by making false statements to the Chief of Engineers as to soundings for work in Savannah harbor and as to rentals on property at Savannah, by falsely certifying as correct certain vouchers for material and labor, by failing to account for certain funds of the United States received by him and by making false reports as to his absence from his station; with embezzlement in violation of the 62d Article of War by paying

out two sums aggregating $575,749.90, United States money, not due or owing any person from the United States.

The court sentenced Carter to be dismissed from the service of the United States, to be fined $5,000.00, to be confined at hard labor at such place as the proper authority may direct for five years and to have his name, place of abode, crime and punishment published in certain newspapers.

The President, notwithstanding that he disapproved the findings of the court as to guilty of twelve of the specifications, approved the sentence as just now stated and designated the United States Penitentiary at Fort Leavenworth as the place of confinement.

To understand this case it should be known that previous to this application for writ of habeas corpus, in October, 1899, Abram J. Rose applied for a writ of habeas corpus to the United States Circuit Court for the Southern District of New York and prosecuted the writ through the various courts until it was finally dismissed by the United States Supreme Court.

In December of that same year, 1899, after denial of the above mentioned application for a writ of habeas corpus, Carter with others was indicted in the United States Circuit Court for the Southern District of Georgia for conspiracy to defraud the United States, the indictment being based on the same facts as set forth in the charges and specifications for conviction of which, by a court-martial, Carter was undergoing punishment.

Now to come back to this case:

Stanton Carter, on behalf of Oberlin M. Carter, filed a petition for a writ of habeas corpus in the Circuit Court of the United States for the District of Kansas in October, 1900, alleging that Oberlin M. Carter was imprisoned by the Warden of the United

States Penitentiary at Fort Leavenworth by virtue of the sentence as above given; that he had been dismissed from the Army of the United States; that his name, abode, crime and punishment had been published in the papers as per the sentence; that he had paid to the United States the fine of $5,000.00 and that his imprisonment and detention were contrary to law and were in violation of the Constitution of the United States for the following reasons:

1st. That no evidence was delivered before the court-martial to show that any crime had been committed by Carter, but on the contrary all the evidence showed Carter wholly innocent of any wrong doing; hence the sentence was wholly void.

2d. That the finding of guilty of embezzlement in violation of the 62d Article of War and the imposing of a sentence were therefore illegal and void for two reasons: (a) the two sums of money alleged to have been paid out by Carter for a purpose not authorized by law were paid out by him for harbor improvements under and in accordance with the specifications of contracts, entered into pursuant to the Act of Congress of June 3, 1896. (b) The acts described in the specifications were not in violation of the 62d Article of War but if justiciable at all by a court-martial they were justiciable under the 60th Article of War.

3d. That the imprisonment and detention were illegal and contrary to the 102d Article of War, prohibiting a second trial for the same offense and were contrary to the fifth amendment to the Constitution of the United States for the following four reasons:

(a) The payment of two checks drawn by Carter and described in each of the specifications under which he was convicted, was the only basis of each of the four charges and that the single act of drawing the two checks had been carved up into four

distinct and different crimes and a punishment assessed on each.

(b) The sentence was beyond the powers of the court-martial and void because under the 60th Article of War the court-martial was authorized to inflict the punishment of a fine or imprisonment or such other punishment as it might adjudge.

(c) That under the 61st Article of War the court-martial had jurisdiction to inflict the punishment of dismissal from the army only.

(d) That the facts set out in the specifications under the 1st, 2d and 4th charges, respectively, brought the offense therein described under the 60th Article of War, under which the court-martial had jurisdiction only to inflict a fine or an imprisonment or some other punishment, in the alternative and not cumulatively.

4th. That both the fine and imprisonment were beyond the power of court to inflict because both were imposed after Carter had ceased to be an officer of the army and after he had ceased to be subject to the jurisdiction of the court-martial.

5th. That the punishment of imprisonment was beyond the power of the court-martial and void because the President in accordance with acts of Congress had fixed the maximum limit for violation of the 60th Article of War, or of the 62d Article of War by embezzlement of more than $100.00, at four years confinement at hard labor.

6th. The sentence was wholly void because the court having found Carter guilty of a large number of specifications had fixed a sentence suitable for such a case but the President disapproved the finding of guilty of certain of the specifications and then approved of the whole sentence of the court. Therefore the sentence as finally approved was not the sentence of the court, nor in mitigation or commuta-

tion of its sentence, but was really in excess of the court's sentence.

During the course of the various applications and and appeals, two other points differing slightly from those given above were claimed by Carter, viz.:

1st. That the specification for embezzlement was placed under the 62d Article of War whereas it should have been placed under the 60th Article of War, because the money was applied to a purpose prescribed by law and the crime charged was not to the prejudice of good order and military discipline because it was "mentioned" in paragraphs 1, 4 and 9 of Article 60; therefore the finding under the 62d Article was void.

2d. That the finding under the 62d Article was void, and, this being the case, the sentence was void and in violation of the fifth amendment to the Constitution of the United States because only two separate crimes remained charged, viz., conspiracy and paying fraudulent claims, while three penalties were imposed, viz., dismissal, fine and imprisonment; and the sentence was greater than could be imposed for any one of the alleged crimes taken singly.

POINTS OF LAW TO BE DECIDED

From the foregoing we see that the following points of law are to be decided:

1. May a civil court review the proceedings of a court-martial to determine whether the evidence brought before the court-martial was sufficient to warrant a conviction?

2. Did the paying out of United States' moneys on contracts authorized by Congress but not fulfilled in accordance with the terms of contract constitute the crime of embezzlement?

3. Did the paying out of United States' money under the circumstances constitute the crime of con-

duct to the prejudice of good order and military discipline in violation of the 62d Article of War?

4. Was Carter twice put in jeopardy of life or limb for the same offense in violation of the fifth amendment to the Constitution of the United States or was he tried a second time for the same offense in violation of the 102d Article of War?

5. Under the 60th Article of War, could the court-martial inflict imprisonment and fine and some other punishment, or could it only inflict one kind of punishment, that is, either imprisonment or fine or some other punishment?

6. Could the drawing of two checks be made the basis of charges for four different crimes?

7. For violation of the 61st Article of War could the court-martial inflict any other punishment than dismissal?

8. After Carter had been dismissed from the army and thus ceased to be subject to the jurisdiction of the court, could he be required to pay a fine, or could he be longer imprisoned?

9. Did the order of the President fixing the maximum limits of punishment that courts-martial might inflict for certain offenses apply to officers as well as to enlisted men?

10. When a court-martial has found a person guilty of several specifications and has given sentence accordingly, may the reviewing authority approve the the whole sentence when he had disapproved the finding of guilty on some of the specifications?

11. In the 62d Article of War does the wording, "Crimes * * * disorders and neglects * * * though not mentioned in the foregoing articles," mean that crimes, etc., so mentioned are not prejudicial to good order and military discipline?

DISCUSSION OF THE CASE AND OPINION OF THE COURT

1. Quoting from the case of Carter vs. Roberts (177 U. S. 496), the court said:

"Courts-martial are lawful tribunals, with authority to finally determine any case over which they may have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced."

Jurisdiction by the court-martial in this case was conceded but it was claimed that the acts charged did not constitute an offense and hence the subject matter was not within the jurisdiction of the court-martial. "Whether the sentence of a military court, approved by the reviewing authority, is open to attack on such ground is a question which" was not decided in this case but it is affirmed that no inquiry into the guilt or innocence of the accused is permissible. (Dynes vs. Hoover, 20 How. 65.)

2. Did the paying out of the United States funds under the circumstances constitute the crime of embezzlement?

Section 5488 Revised Statutes reads, "Every disbursing officer of the United States who * * * for any purpose not prescribed by law withdraws from the treasurer or any assistant treasurer or any authorized depository, or for any purpose not prescribed by law transfers or applies any portion of the public money intrusted to him, is, in every such act, deemed guilty of an embezzlement of the money so * * * withdrawn, transferred or applied and shall be punished by * * *."

The court held that the specifications under charge 4 detailed acts of Carter which came within the meaning of this section of the Revised Statutes and it was for the court-martial alone to determine

whether Carter had been guilty of the acts described in the specification.

3. The court likewise held that it was "peculiarly for the court-martial to determine whether the crime charged", embezzlement, "was to the prejudice of good order and military disipline".

4 and 5. Carter claimed that the finding of guilty of the fourth charge (embezzlement in violation of the 62d Article of War) was beyond the power of the court and that if that finding was void then the sentence of the court was in violation of the fifth amendment to the Constitution because the sentence was greater than the court-martial had jurisdiction to inflict on conviction of any one of the offenses charged, taken singly, and because the offenses charged were the same within the meaning of the constitutional provisions.

Supposing his claim that the finding of guilty of the 4th Charge was beyond the power of the court-martial, then was the fifth amendment to the United States' Constitution violated by the sentence imposed?

No, because "the fifth amendment is not applicable in the proceedings of the court-martial." The only objection in this respect that could be legally made was that the 102d Article of War, "No person shall be tried a second time for the same offense," was violated. This objection was not brought out at the time of the trial and is therefore assumed to have been waived and is not now permissible on the application for habeas corpus.

Further, if the objection had been made before the court-martial it was within the power of the court-martial to decide the matter and if the decision was incorrect it was then a matter of error and would have nothing to do with the jurisdiction.

(See In re Belt, Petitioner, 159 U. S. 95, and Ex parte Bigelow, 113 U. S. 328, 330.)

As to that portion of the argument that the sentence was greater than the court-martial had jurisdiction to inflict on conviction of any one of the offenses charged, taken singly, the court states in effect as follows:

Article 60 says that any person in the military service who makes or causes to be made any claim against the United States knowing such claim to be false, etc., etc., "shall on conviction thereof be punished by fine or imprisonment or such other punishment as a court-martial may adjudge."

Article 61 says that "any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service."

It was claimed by Carter that punishment must be imposed under either one or the other or both of the above Articles of War; that under the 61st Article the only possible punishment is dismissal and that under the 60th Article the punishment is alternative but not cumulative, that is, any of the named punishments might be inflicted but not two or more than two of those named. It was then claimed that the sentence of dismissal and fine having been imposed and carried into execution the imprisonment he was now undergoing was illegal. The court however decided that the use of the word, "or," in describing the punishment under the 60th Article was only intended to give discretion to the court imposing sentence and did not prevent the imposing of both fine and imprisonment. (Winthrop, vol. 2, p. 1101.)

In support of this interpretation of the word, "or," the court went into the history of the origin and growth of the 60th Article of War. The court also stated that if Carter's claim as to the meaning of the 60th Article of War was correct, yet both fine and imprisonment could be imposed in this case under that Article because several offenses had been com-

mitted by Carter, as shown under the specifications to that charge, and a fine could be imposed for one of these offenses and imprisonment for another and the two given as an entirety for violation of the various provisions of the Article, as prescribed in the specifications. This is the usual method in court-martial procedure.

The court says: "The offenses charged under this Article were not one and the same offense. * * * The first charge alleged 'a conspiracy to defraud' and the second charge alleged 'causing false and fraudulent claims to be made,' which were separate and distinct offenses, one requiring certain evidence which the other did not. The fact that charges related to and grew out of one transaction made no difference."

In support of this the court quotes from the Supreme Court of Massachusetts in the case of Morey vs. Commonwealth, 108 Mass. 433, as follows:

"A conviction or acquittal upon one indictment is no bar to subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." (Winthrop, Vol. I (2d Ed.) 614; Rose ex rel. Carter vs. Roberts, 99 Fed. Rep. 948.)

The court therefore decided that the sentence given was not in excess of that which the court-martial was authorized to impose and he had not been twice tried for the same offense. (In re De Bara, 176 U. S. 316; In re Henry, 123 U. S. 372.)

6. Carter claimed that the offense of conduct

unbecoming an officer and a gentleman was the same offense as those charged under the 60th Article of War, but was called by a different name, and therefore the punishment of dismissal was illegal because a third punishment was given when but two offenses were committed. To this claim the court answers:

"The offense of conduct unbecoming an officer and a gentleman is not the same offense as conspiracy to defraud or the causing of false and fraudulent claims to be made, although to be guilty of the latter involves being guilty of the former."

Moreover, conviction of fraud and causing false claims to be presented subjects the officer to liabilty to dismissal as is indicated in the 100th Article of War.

(See also distinction made between "act" and "offense" in 4 and 5 ante.)

7. The claim of Carter that for conduct unbecoming an officer and a gentleman he could receive no other punishment than dismissal was accepted by the court as correct without remark.

8. The different provisions of the sentence took effect concurrently while the accused was under control of the military authorities as an officer, the date of all the punishments being the same. After he was sentenced his status was that of a military prisoner held by the United States as an offender against its laws, and subject as such to the Rules and Articles of War. (Rev. Stat., Sec. 1361.) It is a principle of law that where jurisdiction has attached it cannot be divested by mere subsequent change of status. (Barrett vs. Hopkins, 7 Fed. Rep. 312; Coleman vs. Tennessee, 97 U. S. 509; Ex parte Mason, 105 U. S. 606.)

9. The term of imprisonment as per Carter's sentence was five years instead of four, as fixed by the President for such a case in his orders giving maxi-

mum limits of punishment. The order of the President prescribing limits of punishment used the words "enlisted men" in all cases, but the Army Regulations of 1907 provided that—

"Whenever by any of the Articles of War punishment is left to the discretion of the court, it shall not, in time of peace be in excess of a limit which the President may prescribe. The limits so prescribed are set forth in the Manual for Courts-Martial."

This manual makes no attempt to extend the limitations to others than enlisted men, hence it was decided that the President's orders as to maximum punishments applied only to enlisted men and did not affect this case.

10. Does the sentence cease to be the sentence of the court-martial because of the disapproval of certain specifications by the reviewing authority?

In the Articles of War enacted by Congress on April 10, 1806, the 65th Article read:

"But no sentence of a court-martial shall be carried into execution until after the *whole proceedings* shall have been laid before the officer ordering the same or the officer commanding the troops for the time being."

In the revised statutes this article became Section 104 and read:

"No sentence of a court-martial shall be carried into execution until the *whole proceedings* shall have been approved by the officer ordering the court or by the officer commanding for the time being."

On July 27, 1892, this was amended to read:

"No sentence of a court-martial shall be carried into execution until *the same* shall have been approved by the officer ordering the court or by the officer commanding for the time being."

Note that the original required the *whole proceedings to be laid* before the reviewing authority and

the revised statute that the *whole proceedings* should be approved, while the amended article (Act of July 27, 1892,)requires that *the sentence* should not be carried into execution until *it was approved.* Hence, approval of the sentence only, and not of the whole proceedings, is now required before carrying the sentence into execution.

"In criminal cases, the general rule is that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad." (Claassen vs. U. S., 142 U. S. 140, 146; Peake vs. Oldham, Cowper 275, 276; Rex vs. Benfield, 2 Bur. 980, 985; Grant vs. Astle, 2 Dong. 722, 730).

In this country, "in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good counts only."

This is illustrated in Ballew vs. U. S., 160 U. S. 187, and Putnam vs. U. S., 162 U. S. 687.

Carter's argument was that had the court-martial acquitted him on the specification as to which their finding of guilty was disapproved, the sentence would have been lighter, hence the President should have sent the case back to the court for reconsideration or should have mitigated the punishment and that, since he did neither of these, the punishment must be regarded as increased.

Court-martial procedure permits an indefinite number of offenses being charged and tried in the same proceeding and whenever an officer is supposed to be guilty of several offenses, charges covering them all should be preferred and brought to trial at the same time.

"A duly approved finding of guilty on one of several charges, a conviction upon which requires or

authorizes the sentence adjudged, will give validity and effect to such sentence, altho' the similar findings on all the other charges are disapproved as not warranted by the testimony." (Dig. Op. Judge-Advocate Gen., Ed. 1895, p. 696. Same, Ed. 1868, pp. 343, 350.

The President disapproved of the findings of guilty of some of the specifications but approved the findings of guilty of one or more specifications under each charge, and of the findings of guilty of all the charges and approved the sentence. It was discretionary with him to refer the proceedings back to the court for a revision but he was not obliged to do so if he thought the sentence was justified by the findings which he did approve. As President he might have pardoned, as reviewing authority he might have pardoned or mitigated the punishment adjudged except that of dismissal but he had no power to add to the punishment. Not thinking it proper to remand, mitigate or pardon he acted within his authority "and the judgment he rendered cannot be disturbed on the ground of such action."

11. In the 62d Article of War what is the effect of the phrase, "though not mentioned in the foregoing Articles of War"?

"The construction would not be unreasonable if it were held that the words, 'though not mentioned in the foregoing Articles of War,' meant 'and that the Article was intended to cover all crimes whether previously enumerated or not'. The reference is to crimes created or made punishable by the common law or by the statutes of the United States, when directly prejudicial to good order and military discipline. We think it would be going much too far to say that if a court-martial so construed the words, and sentenced for a crime previously mentioned, the sentence, when made his own by the President, would be absolutely void."

Winthrop however holds the contrary (Vol. 2, p. 1126).

However, even if Winthrop's view should be accepted it was thought by the court that the crime specified in the 4th Charge was not one that could be regarded as mentioned in the foregoing articles because the specifications under the 4th Charge set forth acts that constituted embezzlement as per Section 5488, Revised Statutes, but not the acts described in the 60th Article of War. The funds of the United States intrusted to Carter for disbursement were not "furnished or intended for the military service" but were for river and harbor improvement.

DECISION OF THE COURT

The order of the lower court was affirmed and Carter held to complete his sentence.

LIST OF AUTHORITIES AND CASES CITED

Dig. Op. Judge-Advocate Gen., Ed. 1895, p. 696.
Dig. Op. Judge-Advocate Gen., Ed. 1868, pp. 343, 350.

Winthrop's Military Law, Vol. 2, 2d Ed., p. 1101.
Winthrop's Military Law, Vol. 1, 2d Ed., p. 614.
Winthrop's Military Law, Vol. 2, 2d Ed., p. 1126.
29 Stat. 202, c. 314.
30 Stat. 11, 44, c. 2.

Revised Statutes §1342, 5488, 5442.
Revised Statutes §5438.
Revised Statutes §1361.

In re Carter, 97 Fed. Rep. 496.
In re Carter, 99 Fed. Rep. 948.

Carter vs. Roberts, 176 U. S. 684.
Carter vs. Roberts, 177 U. S. 496.
Carter vs. Roberts, 105 Fed. Rep. 614.

Smith vs. Whitney, 116 U. S. 178.
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In re Henry, 1 23 U. S. 372.
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U. S. vs. Fletcher, 148 U. S. 84.
Coleman vs. Tennessee, 97 U. S. 509.
Ex parte Bigelow, 113 U. S. 328, 330.
Ex parte Mason, 105 U. S. 696.
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Claassen vs. U. S., 142 U. S. 140, 146.
Peake vs. Oldham, Cowper 275, 276.
Rex vs. Benfield, 2 Bur. 980, 985.
Grant vs. Astle, 2 Dong. 722, 730.
Ballew vs. U. S., 160 U. S. 187.
Putnam vs. U. S., 162 U. S. 687.
Swain vs. U. S., 165 U. S. 553.
16 Op. Att. Gen. 349.
7 Op. Att. Gen. 604.
22 Op. Att. Gen. 595.
22 Op. Att. Gen. 589.

KIRKMAN vs. McCLAUGHRY

Circuit Court, District of Kansas, First Division, 1907

152 Federal Reporter 255

Prepared by Captain G. L. Townsend, 1st Infantry

STATEMENT OF CIRCUMSTANCES

This is a petition for a writ of habeas corpus filed by George W. Kirkman, late Captain, 25th Infantry, against R. W. McClaughry, the warden of the United States penitentiary at Fort Leavenworth, where the petitioner is confined by authority of sentences of general courts-martial duly and regularly entered against him and properly approved in compliance with the Articles of War.

In pursuance of Special Orders 9, dated Headquarters Department of the Missouri, January 9, 1905, Kirkman was regularly tried by a general court-martial for violation of the 61st and 65th Articles of War. He was convicted on May 23, 1905, and sentenced as follows:

"And the court does therefore sentence him, Captain George W. Kirkman, Twenty-fifth United States Infantry, to be dismissed from the service of the United States and to be confined at hard labor in such penitentiary as the reviewing authority may direct for the period of two (2) years."

The above trial was delayed, and, while awaiting its termination, Kirkman was again tried for violation of the 61st and 62d Articles of War, per Special Orders 47, dated Headquarters Department of the Missouri, March 13, 1905, and was convicted and sentenced to be dismissed the service and to be

confined at hard labor for one year. The form of the sentence was the same as the above.

The sentences in both cases was approved by the President on the same day, June 15, 1905. The trials were before separate courts-martial and for distinct offenses.

In his petition Kirkman says: "Your petitioner further shows to your honorable court that a sentence of a court-martial becomes valid only when sanctioned by the reviewing authority; that the sentences of both of the above-mentioned courts-martial were approved on the same day by the reviewing authority, namely, June 15th, 1905; that both sentences began to run on said day; that on January 22, 1907, allowing for good behavior, a time equal to the longest sentence had been served; that both sentences ran concurrently, and therefore on said 22d day of January, 1907, both sentences had been served and suffered."

POINTS OF LAW TO BE DECIDED

1. Did the sentences in the two trials of Kirkman operate consecutively or concurrently?

2. Will the word "soldiers" in paragraph 981, Army Regulations, be construed to apply to officers as well as private soldiers?

DECISION OF THE COURT

Pollock, District Judge.

He states that it is the settled rule in civil courts (the term "civil" being used in contradistinction to military) that when imposing sentence upon an offender convicted of two or more counts charging separate and distinct offenses, or after conviction in two or more cases in which distinct crimes are charged, that the terms of imprisonment imposed may run consecutively or cumulatively instead of concurrently; that is, the second term to begin at the expiration of the first, etc. Blitz vs. United States, 153 U. S. 308;

Howard vs. United States, 75 Fed. 986; In re Esmond (D. C.), 42 Fed. 827.

However, conceding the power of the court in such cases to impose sentence against an offender prescribing different terms of imprisonment to run consecutively, as a settled rule the sentence pronounced must clearly and definitely express the purpose and intent that the terms are to be served consecutively, or it will be held the terms run concurrently, and not cumulatively. U. S. vs. Patterson, 29 Fed. 775; Ex parte Gafford, 25 Nev. 101; Ex parte Hunt, 28 Tex.

From the above, his conclusion is that if the sentences imposed by courts-martial had been imposed by a civil court, that the petitioner would be entitled to his discharge because the language of the sentences does not imply an accumulative term of imprisonment.

The question is raised as to whether the rules of law are applied to judgments of courts-martial as they are to those of civil tribunals, and he says:

"Courts-martial possess the same full, complete, and plenary jurisdiction over offenses committed against military law as have civil courts of the country over controversies within their cognizance, and while acting within the sphere of such exclusive jurisdiction they are supreme." Carter vs. Roberts, 177 U. S. 497; In re Grimley, Petitioner, 137 U. S. 147; Smith vs. Whitney, 116 U. S. 167.

There was no question raised as to the jurisdiction of the court-martial, and the court says:

"Coming, then, to the consideration of the precise question involved, the legal effect of the sentences imposed upon petitioner as a justification to the warden for his admitted detention of petitioner, it is clear to my mind such legal intent must be founded in the law administered by courts-martial imposing the sentence against the petitioner, as construed by

those officers of the War Department of the government learned in military law and its practice as enunciated in the adjudicated cases emanating from that department, for, as has been said, while such rulings may not be binding upon this court, yet they are entitled to great weight and consideration, and should not be overthrown, except for the most cogent reasons and upon undoubted grounds.

Paragraph 981 of the Army Regulations provides: "When soldiers either undergoing or awaiting sentence commit offenses for which they are tried and sentenced the second sentence shall be executed upon the expiration of the first.

"This regulation, as has been seen, is embodied in and forms a part of the law administered by courts-martial. Under the language of the return which is admitted by petitioner to be true, this regulation is directly applicable to and decisive of the question involved had petitioner been a private soldier instead of an officer of the rank of captain; the insistence of petitioner being that this regulation does not control here for that reason. Whatever may be the distinction in the service, as the term, 'soldier,' and 'officer' are used in common parlance, I am inclined to the opinion that the word 'soldier,' as as employed in this regulation, is used in its general signification, and is applicable to petitioner. The regulation above quoted would seem from the authorities on the subject to be the outgrowth of a general rule of procedure obtaining in military law long prior to its announcement; that is to say, the regulation seems to have sprung from the law, and not the law from the regulation."

The works on military law by Winthrop and Davis are quoted in support of the above as well as opinions by Judge-Advocate General Holt and Judge-Advocate General Leiber on the same subject.

The court proceeds:

"The above rulings formulate and contain what has been the settled practice of the War Department of our government on the subject now under investigation for more than one-third of a century, and these

rulings are known and understood of all men learned in military affairs. Such being the settled and well known practice of the War Department, and as petitioner is now held in conformity to such established practice in execution of the judgments imposed by courts-martial, while such practice is not in harmony with that which obtains in civil courts of this country, yet I am fully convinced, from the fact that he became an officer of the army engaged in the service of his country, he is not entitled to insist on the rules of law applicable to sentences imposed by the civil courts of his country, in the exercise of their criminal jurisdiction, being now employed to effectuate his release from confinement legally imposed under the known and well established practice and procedure followed by military courts in the exercise of their exclusive jurisdiction, and in conformity with the Articles of War and regulations promulgated by the President for the government of the service to which he was subject when he committed the offenses charged, and to the authority of which he must bow.

"It follows that the return made by the warden must be held to be a complete justification for the restraint of the petitioner, and the petition be dismissed."

LIST OF CASES CITED

SUPREME COURT

Blitz vs. U. S., 153 U. S. 308.
Carter vs. Roberts, 177 U. S. 496.
In re Grimley, Petitioner, 137 U. S. 147.
Smith vs. Whitney, 116 U. S. 167.
Kurtz vs. Moffitt, 115 U. S. 487.
U. S. vs. Healey, 160 U. S. 136.
Railroad vs. Whitney, 132 U. S. 366.
U. S. vs. Freeman, 3 How. 566.
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Ex parte Reed, 100 U. S. 13.

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Howard vs. U. S., 75 Fed. 986.
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U. S. vs. Patterson (C. C.), 29 Fed. 775.
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OTHERS

Kite vs. Commonwealth, 11 Metc. (Mass.) 581.
Mims vs. State, 26 Minn. 498.
State vs. Carlyle, 32 Kan. 716.
Ex parte Gafford, 25 Nev. 101.
Wallace vs. State, 41 Fla. 547.
Larney vs. Cleveland, 34 Ohio St. 599.
In re Strikler, 51 Kan. 700.

In re STUBBS

Circuit Court, D. Washington, W. D. 1905
133 Federal Reporter 1012

Prepared by Captain R. H. McMaster, 1st Field Artillery.

STATEMENT OF THE CASE

In July, 1904, at a maneuver camp, at American Lake, Washington, Private Fredie R. Stubbs, Co. K, 19th U. S. Infantry, shot and killed Private Tom C. Vandiver of the same company and regiment. Stubbs was delivered, by the officers of his regiment, to the civil authorities of Pierce County, Wash. He was tried for murder and acquitted by the jury.

Afterwards he was again taken into military custody and was arraigned before a general court-martial upon the following charge and specification:

"Charge 1: Conduct to the prejudice of good order and military discipline in violation of the 62d Article of War.

"Specification: In that Private Fredie R. Stubbs, Co. K, 19th U. S. Infantry, did assault Private Tom C. Vandiver, Co. K, 19th U. S. Infantry, by shooting him with a rifle, and did wound the said Vandiver, thereby causing his, the said Vandiver's, death."

He was found guilty as charged and sentenced to be dishonorably discharged from the service of the United States, forfeiting all pay and allowances due him, and to be imprisoned for five years.

The sentence was put into effect.

The case comes before District Judge Hanford on application for writ of habeas corpus.

POINTS OF LAW TO BE DECIDED

1. Is the trial and acquittal of the petitioner, on

a charge of murder, before a civil court, a bar to his subsequent trial before a military court for violation of the 62d Article of War.

2. Does a charge of assault with a rifle and the infliction of a mortal wound allege an offense under the 62d Article of War.

3. Did the court-martial have jurisdiction to sentence the accused to a term of five years imprisonment, though such term extended beyond the period of his enlistment.

OPINION OF THE COURT

The record of the proceedings of the superior court shows that the petitioner is not guilty of any crime of which he might have been convicted under the information filed against him. It does not establish as a fact that he did not kill a man, nor that the homicide was not a consequence of "conduct to the prejudice of good order and military discipline."

Although the acts described in the specification are identical with the acts alleged in the information for murder, the elements constituting the offense charged are radically different.

After having surrendered him, the military authorities could not lawfully try the petitioner for murder, for manslaughter, or a criminal assault; but it is equally true that the superior court had no jurisdiction to adjudicate any question with respect to the petitioner's conduct as a soldier.

The Constitution of the United States contains a guaranty that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." It is to be observed, however, that the words, "same offense," are not synonymous with the words, "same act;" and, since more than one offense may actually be committed by a single act, the Constitution does not shield the perpetrator from punishment for other offenses when he has been convicted or acquitted of one.

The 62d Article of War, upon which the second

prosecution is founded, excludes capital crimes, and from the record it is manifest that special care was taken to charge the petitioner with an offense different from the one of which he was acquitted by the Superior Court. Although the same act is specified, the gist of the offense charged is unsoldierly conduct by a soldier, subversive of military discipline. For that offense the petitioner continued to be amenable to military law.[1]

An assault with a lethal weapon and the infliction of a mortal wound by one soldier upon another * * * is amply sufficient to support the charge of a crime comprehended by the 62d Article of War.

The 62d Article of War has been supplemented by the Act of September 27, 1890,[2] which provides that punishment at the discretion of a court-martial shall not, in time of peace, exceed a limit which the President may prescribe. Pursuant to this law the President has fixed as a maximum of imprisonment in cases prosecuted under the 62d Article of War, a term of ten years.

It is the opinion of the court that the surrender of the petitioner to the civil authorities did not have the effect to absolve him from him from his obligation under the terms of his enlistment; nor to keep the military authorities from proceeding against him for the military offense; also that the charge and specification of that offense are not defective, and that the court-martial did not exceed its jurisdiction by sentencing him to imprisonment for a term extending beyond the term of military service for which he was enlisted.[3]

CASES CITED

Cruss vs. North Carolina, 132 U. S. 139.
Ex parte Mason, 105 U. S. 696.
Steiner's Case, 6 Op. Atty. Gen. 413.
Howe's Case, 6 Op. Atty. Gen. 506.

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[1]17 Amer. and Eng. Enc. Law (2d Ed.), pp. 604, 605; Cruss vs. North Carolina, 132 U. S. 139; Steiner's Case, 6 Op. Atty. Gen. 413; Howe's Case, Id. 506.

[2]C. 998, 26 Stat. 491; U. S. Comp. St. 1901, p. 969.

[3]Ex parte Mason, 105 U. S. 696.

HAMILTON v. McCLAUGHRY, WARDEN

Circuit Court, D. Kansas, 1st Division, 1905
136 Federal Reporter 445

Prepared by Captain R. H. McMaster, 1st Field Artillery.

STATEMENT OF THE CASE

On December 23, 1900, Private Fred Hamilton, Troop K, 6th U. S. Cavalry, serving at Pekin, China, with the detachment of the American Army which was engaged in suppressing the "Boxer Uprising", shot and killed Corporal Charley Cooper, also of the 6th Cavalry.

On February 4, 1901, Hamilton was tried by a court-martial convened and sitting at Pekin, China, under the following charge and specification:

"Charge: Murder in violation of the 58th Article of War.

"Specification: In that Private Fred Hamilton, Troop K, 6th Cavalry, U. S. Army, did wilfully, feloniously, and with malice aforethought, inflict a wound on Corporal Charley Cooper, 6th Cavalry, deceased, by firing a ball cartridge from a Colt's revolver, caliber 38, at said Cooper. From the effect of said wound the said Cooper died almost immediately."

The accused submitted a plea in bar of trial, "want of jurisdiction of court."

This special plea was overruled by the court and the accused then pleaded not guilty. The finding of the court was guilty and the sentence was dishonorable discharge and life imprisonment.

Major General Chaffee, the convening and reviewing authority, approved the proceedings of the court but reduced the term of confinement to 20

years in the U. S. Penitentiary at Fort Leavenworth, Kansas.

The case came up before District Judge Pollock on application for writ of habeas corpus.

POINTS TO BE DECIDED

1. Did the court-martial have jurisdiction of the person and offense and was its judgment imposed conformably to law?

2. What department decides whether or not a state of war exists?

3. Did the "Boxer Uprising" in China, in June, 1900, constitute a state of war within the provisions of the 58th Article of War?

OPINION OF THE COURT

The 58th Article of War under which the petitioner was tried and convicted reads as follows:

"In time of war, insurrection, or rebellion, larceny * * * murder * * * shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States," etc.

Counsel for the petitioner insists that at the time of the homicide there prevailed neither war, insurrection, nor rebellion, and therefore the military court was without jurisdiction.

In considering this question a few of the fundamental principles of law may be stated.

It is the settled law that courts-martial are courts of inferior and limited jurisdiction. No presumptions in favor of their exercise of jurisdiction are indulged. To give effect to their judgments imposed, it must clearly appear that the court was legally constituted, that it had jurisdiction of the person and the offense charged, and that its judgment imposed is conformable to law.[1]

[1]Dynes v. Hoover, 20 How. 625; Runkle v. U. S., 122 U. S. 543.

And again * * * where a respondent in habeas corpus admits the restraint charged against him, he must justify by basing his right of restraint upon the exercise of some provision of positive law, binding upon him, or the writ must issue and the person restrained must have his liberty.

The counsel for the respondent contends that at the time of the commission of the homicide a condition of war existed in China, and that this government, as a participant, was authorized to exercise military power by a court-martial to punish one then in that country in the military service of the United States, for the commission of the crimes enumerated in the 58th Article of War. During the military occupation of China by our troops, there were 271 trials by general court-martial. The offenders so tried were not amenable to the laws of China, and offenses by them committed were not committed in violation of any law of China, because done by persons in the military service of the country while stationed in China. [1]

It therefore follows that if any punishment must be meted out for a crime committed by a person in the military service of the United States during the occupation of China, such punishment must be imposed under the 58th Article of War, or the offender go unpunished.

Again, the existence of a condition of war must be determined by the political department of the government, and the courts must take judicial notice of such determination. [2]

In the present case there is no formal declaration of war against either the government of China or the "Boxer" element. A formal declaration of war is,

[1] Coleman vs. Tennessee, 97 U. S. 509; Dow vs. Johnson, 100 U. S. 158.

[2] U. S. vs. 129 Packages, Fed. Case No. 15,941; Prize Cases, 2 Black 666.

however, unnecessary. The question here is whether the government was at the time of the commission of the homicide, prosecuting its rights in Chinese territory by force of arms.

I am constrained to hold that by reason of the occupation of Chinese territory by the large military force of this government (5,000 men), under authority of the War Department, the many conflicts between the forces of this government and the Chinese troops, and the recognition of a condition of war by the Congress of the United States in making payment to the officers and men of this government, there engaged, on a war basis, that there prevailed in China a condition of war at the time of the homicide.

"That the essential and requisite jurisdictional facts authorizing a trial of the petitioner by a general court-martial did exist; and that the judgment of that court must be upheld and enforced.

"The writ is denied."

CASES CITED

Dynes vs. Hoover, 20 How. 625.
Runkle vs. U. S., 122 U. S. 543.
Coleman vs. Tennessee, 97 U. S. 509.
Dow vs. Johnson, 100 U. S. 158.
Prize Cases, 2 Black 666.
U. S. vs. 129 Packages, Fed. Case No. 15,941.

Ex Parte SCHLAFFER

District Court, S. D. Florida, 1907

154 Federal Reporter 921

Prepared by Captain Berkeley Enochs, 19th Infantry

STATEMENT OF FACTS

Schlaffer, an enlisted man of the Army, was stationed at the post of Key West, Florida.

While in the city of Key West, he was arrested for a violation of a city ordinance, was tried and fined $25.00, and, in default of payment, was sentenced to sixty days' imprisonment.

The commanding officer of the post petitioned for a writ of habeas corpus in the District Court, Southern District of Florida, contending that an enlisted man was not subject to municipal ordinances, and could not be arrested, held, and punished for a violation of such, relying upon a cited decision of the Supreme Court of Utah.

Upon the return of the writ, the respondent, the sheriff, objected that the petition was not signed by the party held in custody.

The court overruled this objection, holding that a commanding officer of troops has such an interest in the presence, custody, and control of an enlisted man as would justify his signing a petition for a writ of habeas corpus, although the soldier had not signed the same.

The sheriff thereupon answered that he held Schlaffer by a regular commitment from the city court, showing that he had been regularly tried and convicted for a violation of a city ordinance.

During the hearing upon affidavits under oath, there was testimony tending to show that before the evening of the arrest there had been a raid upon the soldiers, prearranged and premeditated by the police force. Further, that the offense for which Schlaffer was arrested was not a breach of the peace nor an injury to person or property.

The Judge gave his opinion and decision.

He stated that during times of peace the military power is subordinate to the civil and, while an enlisted man is amenable to the statutory law and may be detained on necessary occasions for violations of municipal ordinances, yet when the punishment interferes with the duty he owes to the United States as a soldier, the utmost good faith on the part of the municipal authorities is demanded. And a United States court, in its duty of protecting the interests of the United States in any matter where the necessary governmental agencies are concerned, can justly inquire into any cruel or unfair treatment of him as a soldier or adverse discrimination on account of his position.

Further, the 59th Article of War provides that soldiers shall be delivered up to be tried by the civil authorities only when their acts have resulted in injury to the person or property of a citizen.

The charge upon which Schlaffer was arrested was in no way claimed to be of an injurious nature to person or property.

The demands of public peace often require that municipal ordinances shall be enforced by the arrest of enlisted men, but the question as to what punishment may be inflicted, thus depriving the United States of the soldier's services, is a difficult one.

(The Judge did not decide this question definitely, but was influenced no doubt in his decision in favor of granting the prayer of the petition by the fact

that the offense was not one contemplated by the 59th Article of War—that is, injurious to person or property.)

The judge in conclusion stated that while neither the contention made in this case in behalf of the petitioner that the municipal authorities have no legal right to arrest an enlisted man for violations of its ordinances nor the contention in behalf of the city that the police powers of the city are supreme and that the position of an enlisted man may be ignored and the right to his services by the United States disregarded, can be accepted to the full extent either is claimed, and while he did not have the authority nor desired to act as a court of review of the municipal authorities, it is not considered that it is necessary to inquire fully into the exact legal rights of either party to find a happy medium between their conflicting contentions.

The decision was, that the peculiar conditions of the case satisfied the judge that law and justice required that the prayer and petition be granted and the soldier was restored to the custody of his commanding officer.

The judge then justly observed that it would not be saying too much to say there is no more incontrovertible presumption of a policeman always doing his duty and nothing more than there is of a soldier always strictly obeying the laws.

He recommended that both the civil and military authorities act with fairness, good faith and an earnest desire for the general good when the two have relations with each other, and that the civil authorities recognize the fact that soldiers are liable to be tried for misconduct while on leave and that they should not be treated by them as though they (the soldiers) were amenable to no other power.

And finally, that the position of soldiers and the

requirements of their constant duty demand, in behalf of the National Government from the municipal authorities, such a recognition of its rights as would accomplish a preservation of the peace and the observance of the city ordinances as would in no way affect their duties as soldiers.

THE FOLLOWING POINTS OF LAW WERE DECIDED

1. A commanding officer may sign a petition for a writ of habeas corpus when an enlisted man of his command is the person whose confinement is to be inquired into.

2. When an enlisted man is confined by the civil authorities and discrimination on account of his position as a soldier can be proven against the civil authorities, a writ of habeas corpus will be issued on application to a federal court.

3. Enlisted men may be tried by court-martial for violations of the Articles of War when committed off a military reservation.

4. Enlisted men are amenable to the statutory law.

REID vs. UNITED STATES

District Court, Southern District of New York, 1908

161 Federal Reporter 469

Prepared by Captain Berkeley Enochs, 19th Infantry

STATEMENT OF THE CASE

The soldier, Reid, the petitioner, enlisted in the usual manner on July 18, 1904, to serve three years.

Having been assigned to the 25th Infantry, he was on August 13, 1906, serving at Fort Brown, Texas, near the city of Brownsville.

On the night of August 13-14, 1906, a disturbance occurred in Brownsville, and, after several investigations—one upon the President's own order—had been made, and an effort to discover the perpetrators had failed, the discharge without honor of practically all the enlisted men at Fort Brown was personally ordered by the President.

Reid was so discharged November 9, 1906, and now brings a petition to recover the pay and emoluments which would have accrued to him between the date of his discharge and the expiration of his term of enlistment, had he continued in the service.

The petition is brought under the Tucker Act, which provides redress, under proper circumstances, against the United States in cases of persons who are hired for a specific time and who have been discharged before the time of hire has expired.

This of course implied the contention that an enlistment is analogous to a civil contract of hire and that the President is not proper authority for an early discharge.

The government set up as a defense that the discharge was not made as a punishment of the petitioner, but for the good of the service, and for the maintenance of the morale of the Army.

POINTS OF LAW TO BE DECIDED

1. Is a contract of enlistment a military contract of hire, analogous to a civil contract of hire?

2. Under the assumption that 1 is to answered affirmatively, is the President a proper authority to order an early discharge?

3. Will the courts inquire into the question of the justice of a discharge "without honor"?

The Judge, in giving his opinion, deduced as follows:

1. All questions as to the guilt of Reid and whether the action of the President was unnecessarily severe, cruel or unjust are beyond this judicial investigation.

2. The nature of a soldier's contract of enlistment has been sufficiently treated in In re Grimley, 137 U. S. 147.[1]

3. When Reid enlisted, he did so, not for a definite time, but for three years, "unless sooner discharged by proper authority." No reasons which would be sufficient for early discharge are set out in the enlistment papers. Therefore, if the "authority" be "proper," Reid was legally discharged and has no claim against the Government, since it was not bound as to what reasons would justify the early discharge.[2]

[1]The nature of a soldier's contract of enlistment as given in the case cited (In re Grimley, 137 U. S. 147) is as follows:

"Enlistment is a contract; but it is one of those contracts which changes the status; and where that is changed no breach of the contract destroys the new status or relieves from the obligations which its existence imposes."

[2]Quoting: U. S. v. Cottingham, 1 Rob. (Va.) at page 269, 40 Am. Dec. 710; U. S. v. Blakeny, 3 Grat. (Va.) 405, cited In re Morrisey 137 U. S., at page 159, 11 Sup. Ct. 57, 34 L. Ed. 644.

Also an English Case—In re Tuffnell, L. R. 3 Ch. Div. 173.

4. An examination of the Fourth Article of War indicates that the President is "proper authority" when the Article is interpreted in the light of military practices, customs and procedure well known and judicially recognized long before the date of the Revised Statutes.

By these customs so recognized and approved by Congress, the soldier's engagement was but at the will of the government which he served, and that government by authority of Congress speaks through (for the purposes of this case) the President of the United States.

5. The phrase "without honor" is not known to the statutes. It is found in the regulations which do not bind the Secretary of War who makes them, much less the Commander-in-Chief.[1]

The giving of a discharge without honor is therefore in the discretion of the President in this case and the judicial branch will not review the acts of an executive officer which are discretionary with him.

Note: It is only by a sentence that a dishonorable discharge can be authorized. Being a punishment it cannot be prescribed by an order.

(Digest of Opinions, J. A. G., par. 25.)

Final judgment in favor of the government and against the petitioner.

CASES CITED

In re Grimley, 137 U. S. 147.
In re Morrisey, 137 U. S. 159.
U. S. v. Ringsley, 138 U. S. 87.
Martin v. New York Life Ins. Co., 148 N. Y. 118.
United States v. Cottingham, 1. Rob. (Va.) 629.
United States v. Blakeny, 3 Grat. (Va.) 405.
Smith v. U. S., 24 Ct. Cl. 209.
In re Tuffnell, L. R. 3 Ch. Div. 173 (English Case.)

[1]Smith v. U. S., 24 Ct. Cl. 209.

PUNDT vs. PENDLETON, JAILER

U. S. District Court, N. D. Georgia, N. W. D., 1909

167 Federal Reporter 997

Prepared by Captain J. W. Barker, 3d Infantry

STATEMENT OF THE CASE

This is a case of a petition in the U. S. District Court, N. D. Georgia, for a writ of habeas corpus in behalf of W. A. Pundt and other Quartermaster teamsters at Fort Oglethorpe, Georgia, who were confined in the county jail of Catoosa County, Georgia, by the road commissioners of the adjoining road district for not obeying the summons of the road overseer to work on the public roads outside of the U. S. reservation.

Pundt had been for three years a teamster in the permanent employment of the Quartermaster's Department of the U. S. Army at Fort Oglethorpe, residing continuously at that post and being domiciled in a government building thereon.

Pundt claimed a residence in Texas and he was not an inhabitant of Georgia in the sense in which that term is used in the statutes of Georgia in reference to road duty. He was in the state of Georgia and in Catoosa County simply as an employee of the Quartermaster's Department of the Army.

On or about the 2d day of December, 1907, Pundt and other teamsters similarly employed at Fort Oglethorpe were warned by the road overseer to meet him at Cloud Springs Church on December 4, 1907, to work the public road, said road being situated outside of the said military post and outside of the Chicka-

mauga and Chattanooga National Park, within the road district wherein said commissioners resided.

On account of their duties with the government they did not obey said summons and did not work the public roads. On account of said default, the said road commissioners caused notice to be served on Pundt and the others to appear before them December 28, 1907, to answer said default. Pundt and the others with one exception appeared and testified on their own behalf. They were fined $12.00 each and costs, or, in default of payment, to be committed to the county jail of Catoosa County for thirty days. They defaulted and went to jail.

They then applied for and obtained the sanction of the writ of certiorari. This suspended on bond the execution of the imprisonment until the hearing on the writ which came on before Judge Fite at Dalton, Georgia, on October 12, 1908. He ordered and adjudged that the writs be dismissed upon the ground that no notice had been served upon the opposite party in interest as required by law, and that the judgment of the court below be affirmed and that each of the said petitioners in certiorari pay the cost of said proceeding, and further ordered that the execution of the remainder of the sentence imposed by the road commissioners be suspended until October 22d when all were to appear and perform said sentence.

They presented themselves at Ringgold, Georgia, on October 22d and were imprisoned in the Catoosa county jail in the custody of James B. Pendleton, the county jailer.

They were still in his custody at the time their petition for writ of habeas corpus was served.

POINTS OF LAW TO BE DECIDED

1. Whether state or other local authorities have

power to interfere with any instrumentalities necessary to the proper use, as a military post, of a location acquired by consent of the state legislature for for a national military park.

2. Whether a teamster in the permanent employ of the Quartermaster's Department at Fort Oglethorpe, Georgia, can be required by local authorities to work on roads outside of the U. S. reservation, and whether his imprisonment for failure to work on said roads is a violation of his constitutional and legal rights.

3. Whether it is a bar to habeas corpus proceedings in a U. S. District Court that a state court has previously dismissed a writ of certiorari to review the sentence of imprisonment imposed upon the petitioners.

4. Whether a federal court will discharge on a writ of habeas corpus a Quartermaster's teamster imprisoned by state authorities where such imprisonment is in violation of the Constitution and U. S. laws and prevents the performance of the duties of his employment.

DECISION OF THE COURT

Newman, District Judge.

1. The land on which Fort Oglethorpe and the buildings appurtenant to it are situated is a part of a tract of land of which jurisdiction was ceded to the United States by an act of the Legislature of Georgia. (Laws Ga. 1890-91, Vol. 1, p. 200.)

This act followed the Act of Congress, August 19, 1890, c. 806, 26 Stat. 333, an act by the language of the preamble to establish a National Military Park at the battlefield of Chickamauga.

The Constitution of the United States, Art 1, sec. 8, provides:

"The Congress shall have power * * * to exercise exclusive jurisdiction in all cases whatsoever * * * over all places purchased by consent of the legislature of the state in which the same shall be for

the erection of forts, magazines, arsenals, dock yards, and other needful buildings."[1]

As heretofore stated, the land on which Fort Oglethorpe is located is within the limits of the tracts of land acquired by the United States by the consent of the Legislature of the state. The purpose for which these lands were acquired, as named in the cession, was for a "National Park." The purpose named in the Act of Congress was a "National Military Park." The Act of Congress was in the mind of the Legislature of the state, as shown by the reference to it in the caption of the act. So it seems that little question could exist that to use this land for a military post is in line with the purpose of the cession, even testing it by the language used in the act of the Legislature, and more so when considered in connection with the Act of Congress. It is certainly not in any way antagonistic to the purpose contemplated. It is perfectly clear that, the government having decided it was necessary and proper to establish a military post there, and having established such post by order of the War Department, neither the state, nor any county of the state, would have the right to interfere with instrumentalities necessary to the proper use of this location as a military post, and to render that use effective and complete. This would be true even if the lands had been acquired within the state, without any consent whatever on the part of the Legislature of the state. Taking into consideration, however, the act of the Legislature, passed in view of and to effectuate the Act of Congress, I do not think there is any material difference, for present purposes at least, between the situation here and what it would be if the act of the Legislature had been in the language of the constitutional provisions as to the establishment of forts, arsenals, etc.

The use, therefore, of a part of the ceded land for a military post, while not coming strictly within the act of the cession, is at least not antagonistic thereto. After the establishment of the park, a certain number of troops there would be proper, and might be necessary, to protect the property and carry

[1] Railroad Company vs. Lowe, 114 U. S. 525.

out the purpose of the cession. It is certainly true that the county of Catoosa would have no right to interfere in any way with the troops located at Fort Oglethorpe, or with anything necessary and proper to be used in connection with the fort as a military post and the troops located there.

2. It is not claimed, and will not be claimed, of course, that the officers and enlisted men of the army stationed at the fort are subject to road duty in Catoosa County. Are teamsters, employed and regularly used by the Quartermaster's Department at the fort subject to such road duty?

Section 1133, Revised Statutes, provides:

"It shall be the duty of the officers of the Quartermaster's Department under the direction of the Secretary of War to purchase and distribute to the army all the military stores and supplies, requisite for its use. which other corps are not directed by law to provide; to furnish means of transportation for the army, its military stores and supplies. * * * "

By Act of Congress, March 1, 1875, the President is authorized to make and publish regulations for the government of the Army in accordance with existing laws.

Among such regulations are the following:

Army Regulation 1:

"All persons in the military service are required to obey strictly and to execute promptly the lawful orders of their superiors."

Army Regulation 730 is as follows:

"In the staff corps and departments the employment of civilians will be regulated by the respective chiefs of bureaus under the direction of the Secretary of War. Those whose services are engaged with the intention or probability of retaining them for more than three months are classified as permanent employes * * * ."

The petitioner, W. A. Pundt, is a teamster in the permanent employment of the Quartermaster's Department of the army. It is unnecessary to discuss the necessity of teamsters to the military service. A

military post could not be properly maintained if indeed it could be maintained at all, without teamsters. The character of an army teamster's service and his duties are such that it would be impossible for him to perform them properly and be at the call of the road commissioners to work the public roads of Catoosa county outside of the government property.

Pundt is not an "inhabitant" of the state in the sense in which that term is used in the statutes of Georgia in reference to road duty. He comes from another state, and is in this state and in Catoosa county simply as an employee of the Quartermaster's Department of the army.

In the language of the Circuit Court of Appeals for the Sixth Circuit (In re Thomas, 87 Fed. 453):

"Inasmuch as the legislature * * * had no power to regulate the conduct of this administrative agency of the national government by such a statute as is here in question, it ought to be presumed that the legislature did not intend it to have such an application, and that the statute should be construed accordingly."

This view of the matter, however, is not controlling with me, because I believe Pundt is exempt from this road duty not only for the reason just mentioned but because of the fact that he is a necessary instrumentality in that portion of the United States Army stationed at Fort Oglethorpe, and that he is such an important and necessary part of the military establishment as that the state and county of Catoosa has no right to call upon him to be absent from the fort when such absence would interfere with the proper discharge of his duties as a necessary and important, even if an humble, part of the Army of the United States.

The necessary conclusion, therefore, is that, on account of the petitioner's position and duties in connection with the Quartermaster's Department of the army at Fort Oglethorpe, he is not subject to road duty in Catoosa county as claimed by the road commissioners, and that his detention in jail for failure to perform such road duty is in violation of his rights under the Constitution and laws of the United States, such laws including the Articles of War and the Army

Regulations, the latter made in pursuance of the statutes of the United States and therefore, for present purposes, considered as a part of the statutes.

3. A writ of certiorari was applied for from the decision of the road commissioners, and the same was dismissed in the superior court on the ground as expressed in the order of dismissal, "that no notice has been served on the opposite party in interest as required by law." * * * The notice in this case appears to have been served upon the road commissioners, and, while this fact is not expressed in the order of the superior court, it is evident that this notice was deemed insufficient, and that the road commissioners were not considered "the opposite party in interest." Upon whom this notice should have been served is not apparent from the statutes of the state so far as my examination goes.

In Hughes v. United States, 4 Wall. 232-237, in the opinion by Mr. Justice Field, it is said:

"It requires no argument to show that judgments like these are no bar to the present suit. In order that a judgment may constitute a bar to another suit, it must be rendered in the proceedings between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceedings, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."[1]

This case must stand, therefore, I think, on the action of the road commissioners in recommitting Pundt to jail for his failure to comply with the order of the road commissioners requiring him to work the public roads. He was in jail under this order of the road commissioners when the writ of habeas corpus was applied for.

4. The foregoing being the situation, should Pundt be discharged from custody by an order made in this proceeding?

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[1]Smith v. McNeal, 109 U. S. 426; St. Romes v. Levee, etc., Company, 127 U. S. 614.

Sections of the Revised Statutes of the United States material here are as follows:

"Sec. 751. The Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus.

"Sec. 752. The several justices and judges of the said courts within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint and liberty.

"Sec. 753. The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of a law of the United States, or an order, process, or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States. * * *"

The Supreme Court has in many cases considered and passed upon the question as to when and in what class of cases the courts shall exercise their discretion in favor of discharging a prisoner while in custody under state authority, when on the hearing of a writ of habeas corpus it is claimed that such detention of the prisoner is in violation of the Constition or a law of the United States; and when, on the contrary, it should refuse to discharge and allow the case to go through the courts of the state, and from the highest court of the state to the Supreme Court of the United States. The Supreme Court has always held that, unless a case be exceptional, it should be allowed to take the latter course, and the courts of the United States decline to interfere by habeas corpus proceedings.

The most important cases on the subject, commencing with Ex parte Royall, 117 U. S. 241, are cited in the most recent cases, In re Lincoln, 202 U. S. 178, and Urquhart v. Brown, 205 U. S. 179. In Ex parte Royall, supra, in the opinion of Mr. Justice Harlan, he stated the rule as to how the discretion of the court should be exercised in this class of cases. An extract from that opinion is as follows:

"This court holds that where a person is in cus-

tody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion, whether it will discharge him, upon habeas corpus, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the Circuit Court has still a question whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States."

In Urquhart v. Brown, supra, Mr. Justice Harlan again speaking for the court on this question, said:

"The exceptional case in which a federal court or judge may sometimes appropriately interfere by habeas corpus in advance of final action by the authorities of the state are those of great urgency that require to be promptly disposed of, such, for instance, as cases involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations."

The more important cases in which it has been held that a prisoner in state custody should be discharged when his arrest and detention is in violation of the Constitution or a law of the United States are Ohio v. Thomas, 173 U. S. 276, and Boske v. Comingare, 177 U. S. 459.

In Minnesota v. Brundage, 180 U. S. 499, in the opinion by Mr. Justice Harlan these two cases are referred to in this way:

"So in Ohio v. Thomas, 173 U. S. 276, which was the case of the arrest of the acting governor of the central branch of the National Home for Disabled Volunteer Soldiers at Dayton, Ohio, upon a charge of violating a law of that state, the action of the Circuit Court of the United States discharging him upon

habeas corpus while in custody of the state authorities was upheld upon the ground that the state court had no jurisdiction in the premises, and because the accused, being a federal officer, may, upon conviction, be imprisoned as a means of enforcing the sentence of a fine, and thus the operations of the federal government might in the meantime be obstructed."

The exception to the general rule was further illustrated in Boske v. Comingore, 177 U. S. 459, in which the applicant for the writ of habeas corpus was discharged by the Circuit Court of the United States while held by state officers, this court saying: "The present case was one of urgency, in that the appellee was an officer in the revenue service of the United States whose presence at his post of duty was important to the public interests, and whose detention in prison by the state authorities might have interfered with the regular and orderly course of the business of the department to which he belonged."

The case at bar, in my judgement, comes within the rules laid down in these cases. If the prisoner is confined in jail in Catoosa county, it will necessarily interfere materially with the Quartermaster's Department at Fort Oglethorpe. The importance of this department to the troops is obvious.

In view of the circumstances, I do not think the case should await the slow process and the delay of carrying it through the state courts. It is not at all clear that Pundt has any rights now in the state court. It seems that, if his right to be discharged from custody is ever to be determined, it must be determined and the petitioner have the benefit of it now.

An order will be entered discharging the petitioner, W. A. Pundt, from the custody of James B. Pendleton, jailer of Catoosa County.

What is said in this case is applicable in the other cases, and like orders will be made in all, as they were heard together by consent of counsel.

LIST OF CASES CITED

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U. S. 525.
Hughes vs. U. S., 4 Wall. 232.
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In re Thomas, 87 Fed. 453.

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